85-1914

No. -

Supreme Court, U.S.
FILED
MAY 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

LYNDON H. LaROUCHE, JR.,
PETITIONER,

v.

NATIONAL BROADCASTING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ODIN P. ANDERSON *
ROBERT L. ROSSI
ANDERSON & ASSOCIATES, P.C.
One Longfellow Place, Suite 216
Boston, MA 02114
(617) 742-8200
Attorneys for Petitioner

* Attorney of Record

Blanchard Press, Inc., Boston, Mass.—Law Printers (617) 426-6690

I

QUESTIONS PRESENTED

1. Whether a journalist/defendant in a libel action brought by a public figure may testify during trial as to information she allegedly received from sources whose identity she refused to reveal.

2. Whether a trial judge may refuse to order a journalist to reveal the identity of his or her confidential sources on the ground that the plaintiff had not exhausted alternative sources for the information, when the journalist is a defendant in a libel action brought by a public figure and the plaintiff is presented with an unreasonable burden in attempting to discover the identity through alternative means.

3. Whether a trial judge can refuse to grant judgment n.o.v. on a counterclaim for interference with business relations where there is no evidence of a breach, termination, or other diminution of the relationship, and the relevant state law requires that there be such a breach, termination or other diminution.

4. Whether a trial judge can refuse to grant a mistrial or conduct a detailed inquiry of a jury where two jurors were exposed to a newspaper article prejudicial to petitioner's case and then certain jurors expressed fear for their personal safety manifested in a concern about a sketch artist associated with the petitioner.

II.

PARTIES BELOW

The parties to the proceeding in the Court of Appeals are as follows:

Plaintiff/Counterclaim Defendant: Lyndon H. LaRouche, Jr.

Defendants: National Broadcasting Company, Inc. (also counterclaim plaintiff); Pat Lynch; Mark Nykanen; Brian Ross; Anti-Defamation League of B'Nai B'Rith; Irwin Suall.

TABLE OF CONTENTS

	Page
Questions Presented	I
Parties Below	II
Table of Contents	III
Table of Authorities	IV
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Reasons for Granting the Writ	8
I. This Case Presents Important and Novel Questions Concerning the Ability of a Public Figure Libel Plaintiff to Effectively Prosecute an Action Against a Media Defendant to Vindicate His Reputation	8
A. Permitting the NBC Defendants to Testify During Trial as to Information They Allegedly Received From Confidential Sources Whose Identity They Would Not Reveal Presents a Substantial Federal Question of First Impression Which Should be Decided by This Court	8
B. In Upholding The District Court's Refusal to Order the NBC Defendants to Reveal the Identity of Their Confidential Sources, the Court of Appeals Misconstrued the Nature of the Burden on a Libel Plaintiff Who Seeks to Discover the Identity of a Defendant/Reporter's Sources	16
II. In Upholding The District Court's Refusal to Grant Judgment N.O.V. on NBC's Counterclaim, the Court of Appeals Erroneously Interpreted the Applicable State Law and Upheld a Judgment Based on Evidence Which Was Insufficient as a Matter of Law	22

Page

III. In Upholding the District Court's Refusal to Grant a Mistrial or to Conduct Further Examination of the Jury Based on the Exposure of Some Jurors to a Prejudicial Newspaper Article Concerning Death Threats to One of the Defendants and the Discussion Among the Jurors Concerning Some Jurors' Fear for Their Safety, the Court of Appeals Sanctioned Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision 25

Conclusion 29

Appendix:

A. Opinion of the United States Court of Appeals for the Fourth Circuit A-11
B. Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing A-12
C. Order of the United States District Court Denying Petitioner's Motion to Compel A-13
D. Order of the United States District Court Denying Petitioner's Motion to Preclude A-13
E. Order and Memorandum Opinion of the United States District Court Denying Petitioner's Motion for Judgment Notwithstanding the Verdict A-14
F. Order of the United States District Court Entering Judgment in Favor of NBC on its Counterclaim ... A-28

TABLE OF AUTHORITIES

Cases

Allen Realty Corp. v. *Holbert*, 227 Va. 441, 318 S.E.2d 592 (1984) 24

Carey v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974) ... 17, 21, 22

DeRoburt v. *Gannett Co., Inc.*, 507 F.Supp. 880 (D. Hawaii 1981) 13

Page

Dowd v. *Calabrese*, 577 F.Supp. 238 (D.D.C. 1983) . . 13, 15
Downing v. *Monitor Publishing Co., Inc.*, 120 N.H. 383, 415 A.2d 683 (1980) 13
Ewer's Administrator v. *National Improvement Co.*, 63 F 562 (W.Va. C.C.A. 1894) 28
Gadsden County Times, Inc. v. *Horne*, 426 So.2d 1234 (Fla. App. 1983) 21, 22
Garland v. *Torre*, 259 F.2d 545 (2d Cir. 1958) . . . 17, 20, 21
Gilbert v. *Allied Chemical Corp.*, 411 F.Supp. 505 (E.D. Va. 1976) 18, 21
Glass v. *Glass*, 228 Va. 39, 321 S.E.2d 69 (1984) 23
Goins v. *McKeen*, 605 F.2d 947 (6th Cir. 1979) 27, 28
Greenberg v. *CBS, Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979) 8
Herbert v. *Lando*, 441 U.S. 153 (1979) 18
International Telephone and Telegraph Corp. v. *United Telephone Co. of Fla.*, 60 F.R.D. 177 (M.D. Fla. 1973) 12
Krause v. *Rhodes*, 570 F.2d 563 (6th Cir. 1977) 26
Lucy v. *Amoco Oil Co.*, 582 F.Supp. 1168 (E.D. Mich. 1984) 23
Miller v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980) 17, 18, 19
National Educational Advertising Services, Inc. v. *Cass Student Advertising, Inc.*, 454 F.Supp. 71 (N.D. Ill. 1977) 23
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 17
Paramount Film Distributing Corp. v. *Applebaum*, 217 F.2d 101 (5th Cir. 1954) 26, 28
Patterson v. *Colorado*, 205 U.S. 454 (1907) 25
Philadelphia Newspapers, Inc. v. *Hepps*, ____U.S.____ (1986) 8
Riley v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979) 21

Page

Roviaro v. *United States*, 353 U.S. 53 (1957) 13
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 26
Texas & New Orleans R.R. Co. v. *Underhill*, 234 F.2d 620 (5th Cir. 1956) 26, 28
Time, Inc. v. *Firestone*, 424 U.S. 448 (1976) 11
United States v. *Herring*, 568 F.2d 1099 (5th Cir. 1978) .. 26
Wehling v. *Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979) 11, 14
Williams v. *American Broadcasting Companies, Inc.*, 96 F.R.D. 658 (W.D. Ark. 1983) 18, 19

Constitutional Provisions:

United States Constitution, Amendment One 2

Other:

45 Am Jur.2d Interference, Section 50 (1969) 24

In the
Supreme Court of the United States

OCTOBER TERM, 1986

No. -

LYNDON H. LaROUCHE, JR.,
PETITIONER,

v.

NATIONAL BROADCASTING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinons Below

The opinion of the district court (Cacheris, J.) denying plaintiff/counterclaim defendant LaRouche's motion for judgment notwithstanding the verdict was issued on February 20, 1985, and appears in the appendix hereto at A-15.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 780 F.2d 1134 (4th Cir. 1986), and appears in the appendix hereto at A-1.

BEST AVAILABLE COPY

Jurisdiction

The Order of the Court of Appeals affirming the judgment of the district court was entered on January 9, 1986. Petitioner's petition for rehearing was denied on February 24, 1986, and this Petition for Writ of Certiorari is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

United States Constitution, Amendment One:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

Petitioner Lyndon H. LaRouche, Jr., at the time a declared candidate for the 1984 Democratic presidential nomination, filed a Complaint in the United States District Court for the Eastern District of Virginia (Alexandria Division) on February 10, 1984. Prior to any defendant answering, an Amended Complaint was filed on March 21, 1984. The Amended Complaint, which contained one count for defamation and two counts of conspiracy to defame and sought damages in the sum of $150 million, named as defendants National Broadcasting Company, Inc. ("NBC"), the Anti-Defamation League of B'Nai B'Rith ("ADL"), Pat Lynch, Mark Nykanen, Brian Ross, Irwin Suall, Abbott Rosen, Dennis King and Chip Berlet.[1]

---

[1] Plaintiff took a voluntary dismissal as to defendants King and Berlet during the course of discovery, and the district court granted summary judgment to defendant Rosen prior to trial.

Jurisdiction was predicated on diversity of citizenship pursuant to 28 U.S.C. Section 1332, as the amount in controversy exceeded $10,000 and plaintiff and the various defendants were citizens of different states.[2] In conjunction with its Answers, NBC filed a counterclaim against petitioner which included a count for interference with business relations.

Petitioner's action was based upon two news stories which NBC broadcast concerning him and his associates. The first story was broadcast during the "Nightly News" program on January 30, 1984, and the second during the "First Camera" program of March 4, 1984. The "Nightly News" segment was reported by defendant Brian Ross. The "First Camera" story was produced by defendant Pat Lynch, and defendant Mark Nykanen was the reporter for the broadcast. Defendants Suall, Rosen, Berlet and King appeared on the broadcasts and made defamatory statements about the petitioner. Among the defamatory statements broadcast by NBC on the "First Camera" program were statements to the effect that LaRouche believes that Jews are responsible for all the evils in the world, that any serious investigation of petitioner and his associates by the IRS would lead to criminal indictments, and that in 1977 LaRouche proposed the assassination of President Carter and several of his aides.

During the course of discovery, petitioner served discovery requests directed to NBC. In its responses, NBC claimed that information concerning the identity of its "confidential sources" was privileged and need not be disclosed to petitioner. Petitioner subsequently filed a motion to compel NBC to produce the documents and reveal the information withheld under claim of privilege. This motion was denied by a

---

[2] The plaintiff was a citizen of Virginia at the time the Amended Complaint was filed. Each of the defendants was a citizen of a state other than Virginia.

U.S. Magistrate without prejudice to the petitioner to renew the motion at a later date. After additional discovery had been conducted, petitioner filed a renewed motion to compel, together with a motion to compel Lynch and Nykanen to reveal the identities of their confidential sources, which they refused to disclose to petitioner during their dispositions. These motions were denied by the district court on the ground that LaRouche had not exhausted alternative sources for the information in question. (A-7).

Prior to trial, petitioner filed a motion to preclude the NBC defendants from relying during trial on any information obtained from sources whose identity the defendants refused to divulge to plaintiff. This motion was initially argued before the district court on October 5, 1984, and was denied by the court on October 23, 1984, after the first day of trial. (A-13).

During the trial of this action, numerous witnesses, including petitioner, testified as to the falsity of the major allegations of the NBC broadcasts at issue. Several witnesses who were present in Weisbaden, West Germany, in 1977 when, according to the First Camera broadcast, petitioner allegedly told his close associates that he wished to assassinate President Carter and members of his staff, specifically testified as to the falsity of the assassination allegations. Testimony from petitioner's witnesses also focused on the falsity of the anti-Semitism charges, as well as the allegations of financial impropriety.

The NBC defendants (Pat Lynch, Mark Nykanen and Brian Ross) testified at length during the trial concerning the production of the broadcasts at issue and the basis for the defamatory allegations concerning petitioner. The bulk of this testimony came from Pat Lynch, the producer of the First Camera broadcast, who testified for almost three (3) days.

Lynch testified at length concerning her sources of information for the allegations of the broadcast, including the witnesses who were interviewed and written materials she reviewed. Since petitioner's motion to preclude the NBC defendants

from relying on information received from confidential sources had been denied, Lynch was permitted to testify about the information she allegedly received from persons whose identity she refused to reveal.

For example, with respect to the assassination allegation, Lynch testified that one of her confidential sources, whose identity she refused to reveal, was an American who was allegedly present with petitioner in Weisbaden in 1977, and told Lynch about the alleged assassination plot. Lynch also testified that she had another confidential source—who was a former associate of petitioner—who told her that he was aware of the assassination story, although he was not present in Weisbaden at the time. This testimony augmented Lynch's testimony with respect to information received over the telephone from a man named Larry Cooper, who was present in Weisbaden at the time the assassination plot was supposedly discussed, and information received from Gordon Novel, Lynch's former confidential source who had appeared on the broadcast and discussed what Cooper supposedly had told him about the plot. Lynch further testified that she talked to another journalist about this allegation, who told her that *his* confidential sources allegedly had been in Weisbaden and confirmed the story.

Lynch also testified as to information received from a confidential source relative to the allegation that any serious investigation of LaRouche and his organizations by the IRS would lead to criminal indictments. According to Lynch, the only evidence to support this allegation—which allegation was made on the broadcast by a person whose face appeared on the program in shadowy form so as to preclude identification—was the testimony of several confidential sources, none of whom provided documentary proof of their charges. Mark Nykanen, the reporter on the broadcast, was permitted to testify that Lynch informed him that the unidentifiable person who made this allegation on the broadcast was a former member of the

"LaRouche organization" who had intimate knowledge of its finances. Brian Ross, the reporter on the Nightly News segment, also testified as to certain information he allegedly received from his confidential sources.

On the third day of trial, while Lynch was still in the process of testifying, the *Washington Post* printed an article, which was made part of the record, reporting an alleged death threat against Ms. Lynch. This alleged threat had been brought to the Court's attention the previous day. After finding that the article was prejudicial to petitioner's case, the Court polled the jury in open court as a group. One of the jurors stated that she had seen the headline, and another juror indicated that she had seen a reference to the story in the paper. Judge Cacheris then questioned these two jurors individually at the bench, after which counsel for petitioner moved that the two jurors be stricken. This motion was denied, whereupon petitioner orally moved for a mistrial, which was also denied.

The following morning a note was received from the jury stating that they expressed concern that the artist be identified as not for the petitioner. In discussions at sidebar, it was revealed that a sketch artist from New Solidarity, a newspaper with which petitioner is associated, had been present in the courtroom. The Court then sent a note to the jury inquiring about the nature of their concern. In response, the jury wrote, and then crossed out, that "some members express concern for their personal safety." The Court then conducted an individual *voir dire* of the jurors, initially asking them whether they had any fear for their personal safety.

In response to the Court's questioning, juror Kelly stated that she did fear for her personal safety. Another juror (Fewell) responded that she didn't like the idea of the sketch artist being able to draw and sit and look right at the jury. After the questioning, petitioner moved for a mistrial. The Court refused to grant a mistrial, but instead excused juror Kelly. Petitioner objected to the refusal to grant a mistrial, and also asked the

Court to conduct an additional inquiry of juror Fewell. No further inquiry was conducted.

NBC's counterclaim was based on several telephone calls, which NBC attributed to petitioner, in which the caller allegedly falsely represented his or her identity to the recipient of the call in order to obtain information or cancel scheduled appointments. At trial, the evidence as to the counterclaim was interspersed throughout the testimony on petitioner's action, and was presented primarily during the testimony of Lynch and LaRouche.

Pat Lynch testified that on January 30, 1984, she was at petitioner's Leesburg, Virginia, residence shooting footage for the broadcast, when one of LaRouche's security aides looked at the log in the NBC van and read the details of her interview schedule into a walkie-talkie. Said interview schedule included an appointment to interview Senator Daniel Moynihan. When Lynch returned to the NBC Washington office, her research assistant, Kathi Paterno, told her that Senator Moynihan's office had called and cancelled the interview. While Lynch was in the office, Paterno received another call from someone claiming to be Senator Moynihan's aide, who solicited and received information from Lynch concerning her governmental sources for the story in question. Lynch then rang off and called Senator Moynihan's office. The matter was thereupon straightened out and the interview took place that afternoon as originally scheduled. (A-3).

After extensive deliberations, the jury found against petitioner on his libel claim. On NBC's counterclaim, the jury found in favor of NBC on its claim for interference with business relations. The jury awarded NBC $2,000 in actual damages and $3,000,000 in punitive damages on that claim.

Petitioner then filed a timely motion for judgment *non obstante verdicto*, a new trial, or a remittitur. In an Opinion and Order dated February 20, 1985, the district court denied the first two motions, but granted a remittitur in the amount

of $200,000 on the punitive damage award, which NBC accepted. Petitioner took a timely appeal of the judgment on his libel claim, as well as the counterclaim judgment, and the two appeals were consolidated in the United States Court of Appeals for the Fourth Circuit. On January 9, 1986, the Court of Appeals affirmed the judgments of the district court. Petitioner's timely petition for rehearing was denied on February 24, 1986.

Reasons For Granting The Writ

I. THIS CASE PRESENTS IMPORTANT AND NOVEL QUESTIONS CONCERNING THE ABILITY OF A PUBLIC FIGURE LIBEL PLAINTIFF TO EFFECTIVELY PROSECUTE AN ACTION AGAINST A MEDIA DEFENDANT TO VINDICATE HIS REPUTATION.

A. *Permitting the NBC Defendant to Testify During Trial as to Information they Allegedly Received From Confidential Sources Whose Identity They Would Not Reveal Presents a Substantial Federal Question of First Impression Which Should be Decided by This Court.*

The issue presented by this case is one which has never been decided by this Court, but which is arising with more and more frequency in libel cases. The extensive use of confidential sources by the press, together with the existence of shield laws in many jurisdictions and the recognition of a limited First Amendment privilege by numerous courts, has resulted in the press abusing the confidential source privilege, especially in public figure libel cases. This Court has an opportunity to remedy this abuse of privilege and decide that if reporters wish to withhold the identity of their confidential sources, they may not testify at trial—at least when they are defendants in a libel case—as to any information they received from such sources.[3]

[3] This is the very type of issue that this Court left open in the recent case of *Philadelphia Newspapers, Inc.* v. *Hepps*, ____U.S.____ (1986), Slip opinion at 11.

As noted above, the petitioner filed a pre-trial motion to preclude the NBC defendants from relying during trial on any information obtained from their alleged confidential sources, which motion was denied by the trial judge at the end of the first day of trial. In denying this motion, the district court relied primarily on petitioner's alleged failure to exhaust alternative sources for the information in question. In upholding the district court's ruling, the Court of Appeals considered this motion in tandem with petitioner's motion to compel disclosure of the identity of NBC's confidential sources, and held that the district court did not abuse its discretion in denying these motions on the ground of lack of exhaustion. (A-8).

As a preliminary matter, it is important to note that petitioner's motion to preclude was independent from its motion to compel NBC to disclose the identity of its confidential sources. The preclusion motion was not a motion for sanctions for failure to obey an order compelling disclosure, but rather sought to prevent the NBC defendants from utilizing an evidentiary privilege in violation of plaintiff's rights. The Court of Appeals thus acted improperly in merging its consideration of these two motions and in holding that the district court's denial of petitioner's preclusion motion was a justifiable exercise of its discretion.

As discussed above, Pat Lynch, the producer of the First Camera broadcast, testified at length as to information she received from her sources whose identity she would not reveal. A great deal of this testimony related to the allegation that in 1977, petitioner plotted the assassination of President Carter and several of his aides. For example, Lynch testified that one of her confidential sources was allegedly present in Weisbaden when LaRouche discussed the alleged plot, and that another confidential source was not present but told her that he was aware of the plot. Lynch and Nykanen also testified as to the information allegedly received from confidential sources which supported the allegation that any serious investigation of

LaRouche and his organizations by the IRS would lead to criminal indictments. Both Lynch and Nykanen affirmed that the only information they had to support this allegation came from confidential sources.

Therefore, with respect to two of the most damaging allegations on either of the broadcasts, the jury was informed that NBC relied either exclusively or heavily on information received from persons whose identities the reporters refused to disclose. Thus, this is not a situation where an undisclosed source merely provided information which led to other sources whose identity is disclosed. Instead, the jury was presented with testimony which asked them to credit information allegedly provided by persons whose very existence and identity they had no proof of other than the word of the reporter.

The harm to petitioner in such a situation is well-illustrated by the evidence presented on the alleged assassination plot. Pursuant to decisions of this Court, petitioner, as a public figure libel plaintiff, was required not only to prove falsity, but to prove by clear and convincing evidence that the defendants broadcast the statement with knowledge that it was false or in reckless disregard of its truth. To attempt to meet this heavy burden, petitioner presented not only his own testimony, but the testimony of three persons from Germany who were present with Mr. LaRouche during the time when he allegedly formulated the assassination plot, and who denied that any such discussion ever occurred.

To support the allegation, Lynch testified as to information allegedly received from two persons who were supposedly present when LaRouche discussed the assassination plan—Larry Cooper and an unidentified American who was allegedly a former associate of LaRouche. Without knowing the identity of this person, petitioner was unable to attack his story before the jury except by denying that such a plot had ever been discussed. If the person's identity were revealed, however, petitioner might have been able to show the jury reasons for disbelieving his story. Petitioner was likewise handicapped with

respect to the IRS allegation, which was based *solely* on information received from inidentified persons. If the identities were revealed, petitioner might have been able to show that such persons were in no position to know the facts, or that there were other reasons not to place credence in their information.

In the Court of Appeals, NBC argued that what was involved was a balancing between a reporter's First Amendment privilege on the one hand and a non-constitutionally rooted, state-created cause of action for libel on the other. However, as was recognized in *Wehling* v. *Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979), a libel plaintiff has "a due process right to judicial determination of his civil action."[4] What petitioner sought below was to prevent the NBC defendants from utilizing an evidentiary privilege in violation of petitioner's right to due process and fundamental notions of fairness inherent in our system of jurisprudence.

The reasoning of *Greenberg* v. *CBS, Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979), is instructive on this issue. In *Greenberg*, the plaintiff was a doctor who sued for libel based on a "Sixty Minutes" broadcast concerning amphetamine abuse. At issue were statements made on the broadcast by a former patient of the plaintiff, which statements plaintiff claimed were false and defamatory. Defendants claimed that this person's statements were verified by other patients whom they interviewed, but they refused to reveal the identity of these other patients, invoking the privilege provided by the New York Shield Law.

The *Greenberg* court refused to allow the defendants to take this position, stating that "[t]heir refusal to disclose has deprived the plaintiff of access to valuable and material evidence on a critical element of the plaintiff's cause of action." *Id.* at 966. Thus, the court ruled, in determining the propriety of the lower

---

[4] This Court has also noted that the public has a compelling interest in the "judicial redress of libelous utterances." *Time, Inc.* v. *Firestone*, 424 U.S. 448, 456 (1976).

court's denial of summary judgment, "[n]o consideration will be given to the defense of verification based on confidential material." *Id.* at 997. The court then went on to hold that at trial:

> if the defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility.

Id.

The instant case is even more compelling than *Greenberg*. The plaintiff in *Greenberg* was a private figure, and under New York law only had to prove by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by reasonable parties. The reasoning of *Greenberg* is applicable with even more force when the plaintiff has the heavier burden of proving knowing falsehood or reckless disregard for the truth by clear and convincing evidence, as was the situation faced by petitioner.

The case of *International Telephone and Telegraph Corp.* v. *United Telephone Co. of Fla.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973), is also instructive. The court there initially noted that "[t]estimonial privileges are exceptions to the general duty of every person to give testimony upon all facts inquired of in a court of law." In considering the propriety of the defendant's invocation of the attorney-client privilege, a privilege which the court found to be "the oldest of the testimonial privileges," the court stated that "the privilege was intended as a shield, not a sword." *Id.* Therefore,

> [f]undamental fairness and justice requires that if the defendant intends to waive the privilege at trial by the introduction of evidence within that privilege, then the defendant will be required to allow discovery with regard to matters material to that testimony.

Id. at 186. The court found it impossible to determine what the scope of the waiver of the privilege would be at trial, and therefore could not determine what the scope of discovery of such material should be. However, the Court warned that "the failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence." *Id.* at 186.

In the instant case, the NBC defendants utilized the source privilege as a sword as well as a shield. While using the privilege as a shield to prevent petitioner from discovering the identity of their confidential sources, the NBC reporters also used it as a sword to bolster their case by testifying as to information allegedly received from those very same sources, without revealing the identity of those sources. Such a use of the privilege violates notions of fundamental fairness and justice. As the court stated in *Dowd* v. *Calabrese*, 577 F.Supp. 238, 244 (D.D.C. 1983), "defendants' position—that in effect they can have it both ways—cannot be sustained."

In the criminal area, where disclosure of an informant's identity is relevant or helpful to a defendant's defense, or is essential to a fair determination of the case, the government's informant privilege must give way, and if the government refuses to reveal the informant's identity, the court may dismiss the action. *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957). In the libel area, some courts faced with a defendant/reporter's expected refusal to divulge his sources have held that in such a situation there will be a presumption that the defendant had no sources. *DeRoburt* v. *Gannett Co., Inc.*, 507 F.Supp. 880, 887 (D. Hawaii 1981); *Downing* v. *Monitor Publishing Co., Inc.*, 120 N.H. 383, 387, 415 A.2d 683, 686 (1980). *See also Dowd* v. *Calabrese*, *supra* at 244 (defendants can not have it "both ways", *i.e.*, refuse to divulge the identity of the sources but rely on them at trial; court orders that defendants may not rely upon the existence of any unidentified source as evidence of truth or lack of malice).

The applicability of the *Roviaro* line of cases is not diminished merely because those cases involve a situation where the party bringing the action (the government) refuses to reveal the identity of its sources, thereby hindering the defending party's case, whereas in the instant case the harm from nondisclosure is suffered by the party bringing the action. As the court recognized in *Wehling* v. *Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), such a plaintiff/defendant distinction is often one of form rather than substance. In *Wehling*, a libel case in which the plaintiff exercised his privilege against self-incrimination to frustrate defendant's discovery, the court stated:

> [i]t is true that, as a voluntary litigant, the civil plaintiff has created the situation which requires him to choose between his silence and his lawsuit. In most cases, however, a party 'voluntarily' becomes a plaintiff only because there is no other means of protecting legal rights. As one commentator has observed, although the plaintiff/defendant 'distinction is superficially appealing, . . . civil plaintiffs seldom voluntarily seek situations requiring litigation.'

Id. at 1089 n.10 (citation omitted).

The trial of this case presented a situation where the petitioner was prevented from effectively cross-examining the reporters in question due to their reliance on persons whose identity they refused to reveal, and was likewise impeded in his ability to attempt to show that certain allegations were false and that NBC broadcast the allegations with reckless disregard for the truth. This problem was compounded by the fact that persons whose features were obscured were shown making damaging allegations concerning petitioner on the broadcast and on tape. Presenting these persons on tape, and claiming they feared for their lives, could only serve to enhance the believability of the allegations, while at the same

time preventing petitioner from attacking the basis for those persons' knowledge.

This Court should not permit the press to take the position that they can withhold the identity of their sources while testifying as to what those sources allegedly said. Such a position is not mandated by the First Amendment's guarantee of freedom of the press. In *Dowd* v. *Calabrese*, *supra*, while the court did not order the defendants to reveal the identity of their sources, it utilized an alternative which it found would "substantially allay plaintiffs' concerns without directly infringing on First Amendment interests"; *i.e.*, precluding defendants from relying on the existence of any unidentified source as evidence of truth or lack of malice. 577 F.Supp. at 244.

As noted above, NBC attempted to portray the issue as simply a clash between constitutionally-based privilege and a litigant's non-constitutionally rooted, state-created cause of action. However, the issue is not so simple. Numerous states, including New York, have shield laws providing protection against compelled disclosure of confidential sources, and such laws may provide greater protection to journalists than does the First Amendment. Thus, a federal court in a diversity case (such as the instant one) may be faced with a situation in which a defendant reporter claims the protection of a state shield law, yet the allegedly defamatory broadcast or article at issue was disseminated throughout the country and a different state's substantive law governs the action as a whole. Under those circumstances, allowing a reporter to refuse to reveal his or her source, while still testifying as to information allegedly received from that source, would permit the shield law of one state to frustrate the libel laws of another jurisdiction and infringe the due process rights of a libel plaintiff. Such a result should not be countenanced.

Fundamental fairness and notions of due process dictate that the trial court's ruling on petitioner's preclusion motion not be allowed to stand. Permitting reporters to testify as to information received from sources whose identity they refuse to

reveal would make it easy for reporters to manufacture sources who do not exist, fabricate information allegedly received from sources, or misrepresent the nature of a source (*e.g.*, falsely claim that the source was a close associate of the plaintiff, or was a person in a position to know).

In the present case, for example, defendant Lynch testified that certain damaging information was received from a person who was "high level" in "the LaRouche organization". Without identification of the source, petitioner was prevented from effectively attacking such an allegation by showing, for example, that the named source had no means of access to the information attributed to him. Petitioner knew that someone was lying (either the reporter or the source), but was prevented from proving that. Instead, the jury was asked to take Lynch's word for the very existence of such a source and the content of the information allegedly provided to her. This is totally contrary to basic principles of American jurisprudence, and this Court should not permit such a precedent to be set.

B. *In Upholding the District Court's Refusal To Order the NBC Defendants To Reveal the Identity of Their Confidential Sources, the Court of Appeals Misconstrued the Nature of the Burden on a Libel Plaintiff Who Seeks To Discover the Identity of a Defendant/Reporter's Sources.*

In denying petitioner's motion to compel the NBC defendants to disclose the identity of their confidential sources, the district court grounded its decision on the alleged failure of petitioner to exhaust reasonable alternative means of obtaining the same information. (A-7). The Court of Appeals affirmed this ruling, stating that the petitioner "failed to demonstrate to the court unsuccessful, independent attempts to gain the requested information." (A-8). In so ruling, the Court of Appeals misconstrued the scope of the protection afforded to journalists under the First Amendment and the

extent of the burden on a libel plaintiff who seeks to discover the identity of a defendant/journalist's sources.

In upholding the district court's ruling, the Court of Appeals cited the three-part test which has been widely utilized in determining when disclosure of a reporter's confidential sources should be ordered in the face of a claim of constitutional privilege: (1) whether the information is relevant; (2) whether the information can be obtained by an alternative means; and (3) whether there is a compelling interest in the information. (A-7). *See, e.g., Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). In applying this test, cases have often focused on the relevance of the information to plaintiff's case; *i.e.*, whether the information sought goes to the heart of plaintiff's claim. *See, e.g., Carey* v. *Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) (whether the information sought goes to the heart of the claim is "the most important factor [in the test]"); *Garland* v. *Torre*, 259 F.2d 545 (2d Cir. 1958). Because this is a public figure libel case, the burden on the petitioner at trial was a heavy one, since under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, petitioner not only had to prove that the statements at issue were false, but also had to show, by clear and convincing proof, that the defendants broadcast the allegations with knowledge that they were false or in reckless disregard of the truth. In such a situation, the critical nature of withheld source information is apparent, as recognized in *Carey*.

In *Carey*, the court noted that the heavy burden of proof imposed on a plaintiff in a public figure libel action "will often make discovery of confidential sources critical to any hope of carrying that burden." 492 F.2d at 634. In finding that the identity of the defendant journalist's source was critical to plaintiff's claim, the court noted that it would be exceedingly difficult for plaintiff to introduce evidence, beyond his own testimony, that he did not do certain things which he had been accused of doing. In addition, plaintiff was burdened with having to show malice as well as falsity, and:

> [a]lthough it might be possible to submit the question of malice to the jury simply on the basis of the conflicting allegations of the parties, that procedure would seem to provide that plaintiff little prospect of success in view of his heavy burden of proof.

Id. at 637.

The reasoning of *Carey* has been repeated in a number of cases which have recognized that the heavy burden of proof imposed upon a public figure libel plaintiff will often necessitate the disclosure of confidential sources. In *Miller* v. *Transamerican Press, Inc., supra,* the court held that

> [t]he only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity.

621 F.2d at 726-27. Likewise, in *Gilbert* v. *Allied Chemical Corp.*, 411 F.Supp. 505 (E.D. Va. 1976), a non-libel case, the court noted that in libel cases, "a reporter may have to reveal his source of the information because such a disclosure may go to the 'heart of the plaintiff's claim'." *Id.* at 510. (citation omitted). *See also Williams* v. *American Broadcasting Companies, Inc.*, 96 F.R.D. 658, 665 (W.D. Ark. 1983) (newsman's privilege "must give way, even as to confidential sources, in a libel case where such is necessary for a plaintiff to establish actual malice or reckless disregard of the truth on a given defendant's part.").

In ordering disclosure, *Miller* v. *Transamerican Press, Inc., supra* at 725, relied on the statement by this Court in *Herbert* v. *Lando,* 441 U.S. 153, 175 (1979), that "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert* also involved a claim of privilege by a reporter in a libel case, and the information sought there also went to the issue of malice. This Court took note of the increased burden

placed on a defendant in a libel case, and the importance of discovery to the plaintiff. In rejecting the privilege advanced by the defendants, the Court noted that interests in confidentiality must at times yield to a demonstrated need for evidence. The Court also stated that only complete immunity from liability for defamation would effect the result desired by the defendants, "and the Court has regularly found this to be an untenable construction of the First Amendment." 441 U.S. at 176. *See also Williams* v. *American Broadcasting Companies, Inc., supra* at 670 (privilege concept advanced by defendants "is totally 'at odds' with the principle that malicious libelous utterances are not constitutionally protected.").

The identity of NBC's confidential sources certainly went to the heart of petitioner's libel claim. This is not a case in which all of the confidential sources were merely secondary sources which provided information which led to primary, disclosed sources. Rather, several of the allegations on the broadcasts were attributed directly to confidential sources, and with respect to one of the most damaging allegations (that any serious investigation of petitioner and his organizations by the IRS would lead to criminal indictments), the only source was a confidential informant, and no supporting documentation was obtained. The central nature of the identity of the confidential sources was heightened by the fact that a number of the confidential sources actually appeared on the broadcast with their features disguised, were portrayed as former associates of petitioner, and made extremely defamatory statements about him.

A clearer case for satisfying the "heart of the claim" portion of the *Garland* test cannot be imagined. For example, at trial petitioner denied the existence of any criminal IRS violations. However, without knowing the identity of the source of the allegation, petitioner was unable to effectively refute the allegation and attempt to show recklessness (such as by showing that the source was never in a position to know the finances of the organizations, and that NBC knew this). *See Miller* v.

Transamerican Press, supra at 726 (noting that in *Carey, supra,* "[t]he only evidence within the plaintiff's control that could disprove the story was his own testimony. Since the story was based solely on information from a confidential informant, the only way to determine recklessness was to examine the reliability of the informant."). Petitioner was left at trial with only his testimony to refute this allegation, and, as *Carey* noted, that "provide[d] the plaintiff little prospect of success in view of his heavy burden of proof." 492 F.2d at 637.

Despite the fact that the identity of NBC's confidential sources was obviously critical to petitioner's case, the district court and the court of appeals denied disclosure based on an alleged failure of exhaustion on petitioner's part. Such a ruling runs counter to the reasoning of decisions of other courts. *See, e.g., Carey, supra*; *Miller, supra.*

In *Garland* v. *Torre, supra* at 547, the Second Circuit took into account the fact that plaintiff had deposed three CBS executives without success before attempting to obtain the information from the defendant journalist. In the present case, the plaintiff also took numerous depositions in an unsuccessful attempt to obtain the desired information, and the reason for this lack of success is obvious: the identities of the confidential sources of information were known only to journalists, and were not shared with non-journalists. This is well-illustrated by the trial testimony of Irwin Suall, who testified that Dennis King, a journalist, introduced him to an alleged former associate of petitioner, but refused to reveal that person's real name, and that Suall subsequently met four other former associates of LaRouche who didn't reveal their names. Thus, since the relevant journalists would not reveal the identity of their confidential sources to non-journalists, petitioner faced an insurmountable task in attempting to obtain the sources' identities.

Cases which have considered the element of exhaustion of alternative sources for the desired information have required only that "reasonable efforts" be made by the party desiring

compelled disclosure, *Gadsden County Times, Inc.* v. *Horne*, 426 So.2d 1234, 1241 (Fla. App. 1983), or that the source's identity be "practically accessible" through other means. *Gilbert* v. *Allied Chemical Corp.*, 411 F.Supp. at 510. *See also Riley* v. *City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979) (only "practical access" to the information must be through the journalist's source). As *Carey* v. *Hume*, *supra* at 638-639, recognized, the concept of exhaustion does not bar compelled disclosure when the alternatives present a practical impossibility or an unreasonable burden to plaintiff. In *Carey*, the court emphasized that the alleged observations at issue could have been made by any one of a substantial number of employees. *Compare Garland* v. *Torre*, *supra* at 551 (reporter compelled to reveal identity of source even though court considered it "possible" plaintiff could have learned the identity through alternative means).

Likewise, petitioner here could do no more than guess at the identity of NBC's alleged confidential sources. First of all, there is the possibility that the individuals who provided information about the petitioner (including those who appeared on the broadcast in disguised form) were not what they were alleged to be (*i.e.*, former associates of the petitioner). In those circumstances, no amount of guesswork by the petitioner as to who among his former associates could have made such allegations would have been successful. Even if it is assumed that the sources were in fact former associates of LaRouche, petitioner was still faced with an insurmountable burden in attempting to discover their identities, given the guesswork that would have been involved. This burden was compounded by the five non-party deposition limit imposed by the local rules of the district court, which restricted petitioner's ability to procure compelled testimony. Plaintiff exhausted the number of such depositions available to him, and the court refused to expand this limit on several occasions.[5]

[5] This was especially unreasonable in view of the fact that NBC interviewed over 100 persons in connection with the production of the broadcasts.

The exhaustion element as a basis for the court's ruling is particularly inappropriate with respect to the allegation on the broadcast that any serious investigation of plaintiff and his organizations by the IRS would result in criminal indictments. As noted previously, this statement was made by an unidentifiable person, and the only sources for the allegation were confidential informants. While petitioner attempted to counter this allegation with his own testimony, the only effective means of attack (especially as to the malice element) would have been directed at the credibility of the sources. However, in view of the court's ruling, petitioner could do no more than guess at their identities. There was no evidence that there *had* been any indictments, or that there was an IRS investigation which could provide a basis for the allegation. *Compare Gasden County Times, Inc.* v. *Horne, supra* at 1242. Since the only sources were confidential, and no supporting documents were obtained, there was no practically accessible alternative source for plaintiff to exhaust. *See Carey* v. *Hume, supra* at 639 (litigants should not "be made to carry wide-ranging and onerous discovery burdens where the path is [so] ill-lighted. . . .").

Therefore, since the Court of Appeals failed to give any consideration to the critical nature of the identity of NBC's confidential sources, and misapplied the exhaustion requirement of the *Garland* and *Miller* test, this Court should issue a writ of certiorari to review the Court of Appeals' ruling.

II. In Upholding the District Court's Refusal to Grant Judgment N.O.V. on NBC's Counterclaim, the Court of Appeals Erroneously Interpreted the Applicable State Law and Upheld a Judgment Based on Evidence Which was Insufficient as a Matter of Law.

As noted above, NBC's counterclaim was based on a series of telephone calls which allegedly improperly interfered with NBC's relationship with Senator Moynihan. However, the interview with Senator Moynihan was conducted by NBC's

reporters as scheduled (A-3), and under a proper interpretation of the applicable state law the evidence was thus insufficient to support the jury's verdict. In upholding the sufficiency of the evidence, the Court of Appeals applied an erroneous interpretation of state law.

The Court of Appeals recognized that Virginia law applied to NBC's claim, and quoted from *Glass* v. *Glass*, 228 Va. 39, 321 S.E.2d 69 (1984), in which the Virginia Supreme Court set forth the elements of the tort of intentional interference with business relations. *Glass* defined the elements of the cause of action as follows:

> (1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff. (Citations omitted).

321 S.E.2d at 77. The Court of Appeals rejected petitioner's contention that the third element set forth in *Glass* required a breach, termination, or other diminution in the value of the relationship, and therefore upheld the jury verdict despite the fact that the evidence showed that NBC's interview with Moynihan went forward as scheduled.

The Court of Appeals stated that the third element of an action for interference with business relations as set forth in *Glass* merely requires intentional misconduct which is the proximate cause of injury. However, the very language of this third element as set forth above embraces two separate requirements: intentional misconduct by the defendant *and* the failure of the plaintiff to continue in the relationship. Such an interpretation would make *Glass* consistent with case law elsewhere. *See, e.g., Lucy* v. *Amoco Oil Co.*, 582 F.Supp. 1168, 1173 (E.D. Mich. 1984); *National Educational Advertising*

Services, Inc. v. *Cass Student Advertising, Inc.*, 454 F.Supp. 71, 73 (N.D. Ill. 1977); 45 Am. Jur.2d *Interference*, Section 50 (1969), at 322.

This reading of the language in *Glass* would also be consistent with the reasoning of another case decided by the Virginia Supreme Court, *Allen Realty Corp.* v. *Holbert*, 227 Va. 441, 318 S.E.2d 592, 597 (1984). In *Allen*, which dealt with the related tort of interference with prospective contract, the court stated that the interference must either have caused a third party not to enter into a prospective contract with the plaintiff, or prevented the plaintiff from entering into a contract. 227 Va. at 449. The court in *Glass* clearly intended its decision to extend the protection of the tort laws to a situation where a relationship not embodied in a contract was involved, but nowhere indicated its intention to dispense with *Allen Realty's* requirement that there be a termination of the relationship. Such a ruling would have been inconsistent with case law elsewhere, as well as the then recently decided *Allen* case. Thus, the Court of Appeals erred in interpreting *Glass* so as to cover the instant situation.

Under a proper interpretation of Virginia law as embodied in *Glass*, the evidence introduced at trial was insufficient to support the jury's verdict on NBC's counterclaim. The only evidence of any business relationship in any way connected to the telephone calls in question was NBC's relationship with Moynihan, and that relationship was limited (insofar as the evidence was concerned) to NBC's interview with Moynihan. Since NBC was able to straighten out the situation with Moynihan shortly after the telephone calls were made, and the interview took place as scheduled, there was no breach or termination of the relationship, and no other diminution in the value of this relationship to NBC. The verdict thus cannot stand under a proper interpretation of the applicable law, and this Court should correct this error in the Court of Appeals' ruling which resulted in the court upholding a large punitive damage award against petitioner.

III. In Upholding the District Court's Refusal to Grant a Mistrial or to Conduct Further Examination of the Jury Based on the Exposure of Some Jurors to a Prejudicial Newspaper Article Concerning Death Threats to One of the Defendants and the Discussion Among the Jurors Concerning Some Jurors' Fear for Their Safety, the Court of Appeals Sanctioned Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

As noted above, on the third day of trial the *Washington Post* printed an article concerning an alleged death threat to defendant Pat Lynch, who was then in the process of testifying. Upon polling the jury, it was determined that two jurors had at least seen references to the story in the *Post*. The court refused to strike the two jurors upon petitioner's request, and denied petitioner's motion for a mistrial. On the following day, a note reflecting juror concerns for their safety was received by the court, and some questioning of the jurors was conducted. While one juror was excused based on her expressions of fear for her safety, the court denied petitioner's motions for mistrial and for an additional inquiry of one of the jurors. The Court of Appeals upheld the district court, finding no abuse of discretion in the procedures followed.

The Seventh Amendment to the United States Constitution, which provides that "the right of trial by jury shall be preserved", implicitly requires that a jury not be tainted by bias, undue influence, misconduct, and fear. As this Court stated many years ago,

> [t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. *Colorado*, 205 U.S. 454, 462 (1907). *See also*

Sheppard v. *Maxwell*, 384 U.S. 333, 351 (1966). The reception of extraneous evidence or other matters by the jury may be presumptively prejudicial to a party. *See Krause* v. *Rhodes*, 570 F.2d 563, 567 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Texas & New Orleans Railroad Co.* v. *Underhill*, 234 F.2d 620, 624 (5th Cir. 1956). "[I]t is highly necessary that no outside influence or circumstances should be thrown into the scale to induce a conclusion which otherwise might not be reached." *Paramount Film Distributing Corp.* v. *Applebaum*, 217 F.2d 101, 105 (5th Cir. 1954).

In the instant case, the district court found the article in question to be prejudicial to petitioner's case. This prejudice was compounded by the fact that the jurors' exposure to the article occurred while Pat Lynch was in the process of testifying. In *United States* v. *Herring*, 568 F.2d 1099 (5th Cir. 1978), a newspaper article concerning death threats against a key prosecution witness appeared the day after the government had rested its case. In reversing defendant's conviction, the Court placed great emphasis on the timing of the article, noting that the subject of the death threats had just testified against the defendant. *Id.* at 1103-04. In the present case, not only was the subject of the alleged threat in the process of testifying, but her testimony later that day and the next day included testimony as to alleged threats and harassment by petitioner and his associates directed at reporters.

This exposure to a prejudicial outside influence was compounded the next day when the jury expressed concern over a sketch artist who was associated with the petitioner, and indicated that "some members express concern for their personal safety." While the court conducted a cursory inquiry of the jurors, and excused one juror who stated that she feared for her personal safety, such measures were insufficient under the circumstances. First of all, in response to the court's questioning, a second juror stated that she "just didn't like the idea of [the sketch artist] being able to draw. . .sitting and looking

right at us." (App. 908-909). However, the court did not follow up on this answer, and denied petitioner's request to inquire as to the basis for the juror's concern with respect to the artist. (App. 921). Further questioning of this juror should clearly have been conducted, especially in view of the jury's statement that some members were concerned about their safety, indicating that more than just the one excused juror was concerned.

Further corrective measures were also mandated because of the clear implication that the jurors who feared for their safety discussed this fear with the other jurors. This is evidenced by the fact that the note was from the jury as a whole, and the crossed-out portion noted that some jurors *expressed* concern for their safety. While a trial judge normally has a great deal of discretion in determining the proper corrective measures to utilize, where prejudice is clear, the trial judge's actions may be held to be improper. *See Goins* v. *McKeen*, 605 F.2d 947, 952 (6th Cir. 1979). In *Goins*, the court noted that it was significant that the trial judge failed to make any determination as to whether jurors who had seen a particular article had discussed the article with the other jurors. *Id.* at 953. Here, it is clear that certain jurors did discuss their fears with the rest of the jury.

The court was thus faced with a situation in which two jurors were exposed to an article prejudicial to petitioner's case, and then certain jurors expressed fear for their personal safety manifested in a concern about a sketch artist associated with the petitioner. If those jurors had expressed their fears to the court without involving the other jurors, excusing them might have been sufficient. However, by discussing their fears with other jurors, those jurors poisoned the well and contaminated the entire jury.

It is insufficient to argue, as the defendants did before the trial court, that the jurors' fears were derived solely from the evidence presented to them during the testimony, and that

therefore there was no extraneous prejudicial matter which influenced the jury. Even if this hypothesis is accepted, it ignores the fact that the jurors' fears were discussed with the jury as a whole, and were not confined to the one or two jurors. Additionally, if the jurors' fear was derived from their exposure to the evidence, it indicates that they had already made up their mind as to the allegations of harassment by plaintiff and his associates, and had effectively prejudged the case without hearing all the evidence.[6] *See Ewers' Administrator* v. *National Improvement Co.*, 63 F. 562, 563 (W.Va. C.C.A. 1894). The combination of this prejudgment and the discussions among the jurors required that the trial judge take additional corrective measures.

While the trial judge may have felt that his actions were sufficient to remove any taint from the proceedings, an appellate court is not bound by the lower court's conclusion. In *Paramount Film Distributing Corp.* v. *Applebaum*, *supra* at 105, the court stated:

> It is highly necessary that no outside influence or circumstances should be thrown into the scale to induce a conclusion which otherwise might not be reached. We therefore find it essential to carefully review the record as to the conduct of the jury and such outside matters as could have influenced their verdict, notwithstanding the very thorough consideration which they received at the hands of the lower court.

See also Goins v. *McKeen*, *supra* at 952; *Texas & New Orleans*

---

[6] Further evidence of juror prejudice and prejudgment of the case is provided in a quote from one of the jurors in the *Washington Post* on January 13, 1985, concerning petitioner's trial testimony:

> "He thought he was making points with us. . . . He was making us ill. He's so used to being surrounded by toadies, he doesn't know his effect on people.
>
> "All of us had sores on the inside of our cheeks, either from biting them to keep from laughing, or to keep from screaming, 'You're crazy'."

Railroad Co. v. *Underhill, supra* at 624. The evidence shows that the jury was exposed to extraneous prejudicial materials, that some jurors feared for their personal safety, and that such fears were communicated to the jury as a whole. Under such circumstances, the trial judge should have declared a mistrial, or at the very least conducted further questioning of the jurors concerning the extent of any such discussions and the basis for one juror's concerns about the sketch artist in the courtroom. His failure to take these steps was prejudicial error requiring reversal, and the Court of Appeals thus erred in affirming the district court.

Conclusion

The Supreme Court of the United States should grant the Petitioner a Writ of Certiorari to review all of the issues raised herein.

Respectfully submitted,

ODIN P. ANDERSON *
ROBERT L. ROSSI
ANDERSON & ASSOCIATES, P. C.
One Longfellow Place, Suite 216
Boston, MA 02114
(617) 742-8200
Attorneys for Petitioner

* Attorney of Record

APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 84-2327(L)

LYNDON H. LaROUCHE, JR.,
APPELLANTS,

v.

NATIONAL BROADCASTING COMPANY, INC.; et al.,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. JAMES C. CACHERIS, DISTRICT JUDGE. (C/A 84-136).

Before
PHILLIPS, ERVIN and CHAPMAN,
Circuit Judges

ARGUED: OCTOBER 8, 1985
DECIDED: JANUARY 9, 1986

CHAPMAN, *Circuit Judge*:

These appeals arise from an action filed by Lyndon LaRouche against NBC, the Anti-Defamation League of B'Nai B'Rith (ADL) and others. LaRouche alleged that the defendants conspired to, and did, defame him in two NBC television broadcasts. NBC filed a four count counterclaim alleging, *inter alia*, that LaRouche had interfered with its business relations. NBC prevailed on the defamation claim and on its counterclaim for

interference with business relations. On that counterclaim, the jury awarded NBC $2,000 in actual damages and $3,000,000 in punitive damages. The punitive damages were reduced to $200,000 on remittitur, which NBC accepted. After the trial, the ADL moved for sanctions against LaRouche and his lawyers pursuant to Rule 11, Fed. R. Civ. P. The district court denied this motion.

On appeal LaRouche presents four issues. First, whether the district court erred in denying him judgment n.o.v. as to the counterclaim. Second, whether the district court erred in refusing to compel discovery of NBC's confidential sources. Third, whether the district court erred in permitting NBC to rely at trial upon evidence from these confidential sources which it refused to disclose. Fourth, whether the district court erred in refusing to declare a mistrial on the ground that the jury had been improperly influenced. The ADL also appeals alleging error in the district court's denial of its motion for sanctions against LaRouche and his lawyers. Finding no error, we affirm.

I.

Lyndon LaRouche bases his claim for defamation upon two news stories which NBC broadcast about him and his organization. The first story was broadcast during the "Nightly News" program of January 30, 1984, the second, during the "First Camera" program of March 4, 1984. "First Camera" was a prime time weekly news magazine type program and that broadcast is at the heart of this action.

The "First Camera" story was produced by defendant Pat Lynch, an NBC employee. In the story, NBC published statements to the effect that LaRouche believes that Jews are responsible for all the evils in the world, that any serious investigation of the LaRouche organization by the IRS would lead to criminal indictment, and that LaRouche once proposed the assassination of President Carter and several of his aides.

On January 30, 1984, during the preparation of the "First Camera" story, Lynch went to LaRouche's residence in an attempt to gain an interview with him. While she was there, a LaRouche security guard removed her camera crew's schedule from the NBC van and read the contents of the schedule into a walkie-talkie. According to the schedule, Lynch and her crew were to interview Senator Daniel Patrick Moynihan later that afternoon.

When Lynch returned to the NBC Washington office around midday, her research assistant Kathi Paterno told her that Senator Moynihan's office had called and cancelled the interview. While Lynch was in the office, Paterno received another call from someone claiming to be Senator Moynihan's aide. Under the guise of reconsidering the cancellation, the caller solicited, and received, information about whom NBC had contacted in the course of the story about LaRouche. Becoming suspicious, Lynch rang off and called Senator Moynihan's office only to learn that someone had called the Senator's office and cancelled the interview. Senator Moynihan's office had not called NBC. The interview did take place that afternoon as originally scheduled. That same day a release appeared on LaRouche campaign letterhead bearing the dateline, "Washington, D.C. January 30". It stated: "According to today's NBC-TV log, Pat Lynch and her NBC-TV roving camera crew have an appointment to do a filming in the Senate offices of Senator Pat Moynihan at 5:15 p.m. this afternoon." NBC's counterclaim for interference with business relations rises from these events.

This action was filed on February 10, 1984. Early in discovery, LaRouche moved to compel NBC to disclose the confidential sources of its story. A U.S. Magistrate heard and denied the motion because LaRouche had not exhausted other possible sources of this information. Shortly before the discovery and pretrial motion cutoff date, LaRouche renewed his motion to compel discovery of the confidential sources. Although he

had taken several depositions since his earlier motion, there were some obvious sources of information to which he had not applied. A former LaRouche associate, Larry Cooper, the revealed source of the Carter assassination story was not deposed. Gordon Novel, a confidential source who had come forward during the litigation, had not been deposed, though his deposition had been noticed. In addition, the following statement was published in *New Solidarity*, a LaRouche publication:

> NBC argued that it needs to protect the confidentiality of its sources from disclosure to LaRouche and his staff. The absurdity of this contention is shown by the fact that the names of all of NBC's principal sources were known to LaRouche well before the subject broadcasts and were widely publicized. *New Solidarity*, May 14, 1984 at 5.

The district court denied LaRouche's motion again on the ground that LaRouche had not exhausted alternative sources of information.

Before trial, LaRouche moved the court to preclude NBC from relying at trial on information from confidential sources. The district court denied the motion, ruling that NBC could rely on information received from confidential sources who had appeared on the broadcast in disguised form and from those sources who did not appear on camera.

On the third day of trial, *The Washington Post* printed an article concerning an alleged death threat to defendant Pat Lynch, who was then in the process of testifying. LaRouche moved for a mistrial. The district court polled the jury and found that two jurors had seen the article. The court interviewed these jurors individually and out of the presence of the rest of the jury to determine if they had been influenced by the article. Satisfied that these jurors were not so influenced the district court permitted the trial to continue over LaRouche's objections.

The next day the jury expressed concern in a note to the judge over the presence of a *New Solidarity* sketch artist in the courtroom. Again, a *voir dire* was conducted to determine whether the artist's presence, or anything else, was causing the jurors to fear. Juror Kelly testified that she feared for her personal safety. The court questioned her closely and determined that her fears were not the result of any outside influence, but from evidence of alleged harassment carried out by the LaRouche organization against its perceived enemies. She was excused. Alternate juror Fewel expressed concern over the presence of the sketch artist in the courtroom. She did not testify that she was afraid, only that she did not like the sketch artist being there. Alternate juror Fewel was not excused, neither did she participate in any jury deliberations. Again LaRouche moved for a mistrial or for additional questioning. This motion was denied.

The jury found for NBC and the ADL on LaRouche's case in chief, for defamation. On NBC's counterclaim for interference with business relations, the jury awarded NBC $2,000 in actual damages and $3,000,000 in punitive damages. LaRouche moved for judgment *non obstante veredicto*, a mistrial, and remittitur. The district court denied the first two motions, but granted remittitur to $200,000 on the punitive damages, which NBC accepted.

After judgment was entered, the ADL moved for sanctions in the form of attorney's fees and costs against LaRouche and his lawyers. These sanction were sought under Rule 11, Fed. R. Civ. P.; the inherent powers of the court; and 28 U.S.C. § 1927 (1982). Discovery had turned up an internal memorandum of the LaRouche organization which ordered LaRouche followers all over the country to sue the ADL whenever possible. The ADL saw this memo as evidence that the instant action was brought in bad faith. The district court disagreed and denied the ADL's motion.

LaRouche alleges four error in the district court's denial of his motions: for judgment n.o.v. on NBC's counterclaim for inter-

ference, to compel discovery of NBC's confidential sources, to preclude NBC from relying at trial on information from confidential sources, for further *voir dire* and mistrial. The ADL appeals from the district court's denial of its motions for sanctions.

II

LaRouche claims error in the district court's refusal to grant judgment n.o.v. on NBC's counterclaim for interference with business relations. The evidence, LaRouche maintains, is legally insufficient in two respects. First, there is no evidence of a breach in NBC's relationship with Senator Moynihan, and such a breach, LaRouche argues, is a necessary element of the tort. Second, there is no evidence of injury to NBC by the alleged interference, injury being another necessary element. These arguments are without merit.

Virginia recognized the tort of intentional interference with business relations in the case of *Glass* v. *Glass*, 228 Va. 39, 321 S.E.2d 69 (1984). In that case the Virginia Supreme Court defined the elements of this cause of action as follows:

> (1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff. (Citations omitted).

321 S.E.2d at 77.

We may reverse a jury verdict only when there is a complete absence of facts to support the conclusions reached by the jury. *Sherrill White Construction, Inc.* v. *South Carolina National Bank*, 713 F.2d 1047, 1050 (4th Cir. 1983) (citations omitted).

LaRouche argues that the third element of this tort, as set forth in *Glass, supra*, implies that there must be a breach in the relationship. This is not correct. The third element of this tort is

intentional misconduct which is the proximate cause of the fourth element, injury. Certainly there is sufficient evidence in the instant case for a jury to find that LaRouche intentionally engaged in misconduct which interfered in NBC's relationship with Senator Moynihan.

LaRouche further argues that since the interview took place as scheduled, NBC suffered no injury. While the harm NBC may have suffered is slight, there is evidence of the confusion created over the Moynihan interview and the effort necessary to straighten it out. From these facts the jury could have found some injury.

III

LaRouche charges error in the district court's refusal to compel NBC to disclose confidential sources and in its refusal to preclude NBC from relying on those sources at trial. We find no error. A motion to compel discovery is addressed to the sound discretion of the district court. *Tiedman* v. *American Pigment Corporation,* 253 F.2d 803, 808 (4th Cir. 1958). This remains true even when the object of that discovery is a journalist's confidential source. *Baker* v. *F&F Investments,* 470 F.2d 778, 781 (2d Cir. 1972). In determining whether the journalist's privilege will protect the source in a given situation, it is necessary for a district court to balance the interests involved. *Branzenburg* v. *Hayes,* 408 U.S. 665, 710, 92 S. Ct. 2646, 33 L.Ed.2d 626 (1972) (Powell, J., concurring). To aid in the balancing of these interests, courts have developed a three part test: (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information. *Miller* v. *Transamerican Press, Inc.,* 621 F.2d 721, *modified,* 628 F.2d 932 (5th Cir. 1980), *cert. denied* 450 U.S. 1041 (1981).

In denying LaRouche's motions, the district court grounded its decision on the fact that LaRouche had not exhausted reasonable alternative means of obtaining this same informa-

tion.[1] LaRouche did not depose Larry Cooper, the public source of the Carter asssassination story. He did not exhaust all his non-party depositions before making the motion, and he failed to demonstrate to the court unsuccessful, independent attempts to gain the requested information. In fact, *New Solidarity*, a LaRouche publication, claimed that LaRouche already knew the names of all of NBC's principal sources well before the two reports were broadcasted. Under these circumstances, we find no abuse of discretion in the district court's denial of LaRouche's motion to compel discovery of confidential sources and to preclude reliance at trial upon information from these sources.

IV

LaRouche urges error in the failure of the district court to declare a mistrial in the face of potential outside influence on the jury, or at least to conduct a more extensive *voir dire* of the jury. Two incidents during trial give rise to the alleged error.

The first incident was the article in the *Washington Post* concerning an alleged death threat to Pat Lynch. This court has explained the appropriate procedure for a district court to follow in such an instance.

> Thus, the procedure required by this Circuit where the prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of

---

[1] As an alternative ground for decision, the trial judge noted that the magistrate's denial of the motion to compel disclosure was not clearly erroneous. Because the motion before the district court was a renewed motion, not a motion for reconsideration of a magistrate's order, use of the "clearly erroneous" standard was incorrect. *See* 28 U.S.C. § 636(b)(1)(A) (1982) ("clearly erroneous" standard applies to reconsideration of magistrate's orders). A de novo determination of a failure to exhaust was made, however. Consequently, the district court's error is not dispositive.

> the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further. (Citations omitted). *United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974).

In the case at bar, the district court properly followed these procedures. The jurors who indicated they had seen the *Post* article were questioned individually, outside the presence of the jury. The district court satisfied itself that there was no need to resort to any of the corrective measures available.

The second incident occurred when the jury expressed concern, in a note to the judge, over the presence of a sketch artist in the courtroom. Again, *voir dire* was conducted to determine whether the artist's presence, or anything else, was causing fear among the jurors. One juror testified that she feared for her life. The court questioned her closely as to the source of her fear. She testified that it stemmed not from information she had received from an outside source, but from testimony regarding harassment allegedly carried out by the LaRouche organization against its enemies. The juror was excused.

LaRouche contends that an alternate juror should have been excused. The alternate juror testified that she did not like the sketch artist being able to draw her, but she did not express any particular fear. The district court decided not to excuse this juror, and she did not participate in the jury's deliberations.

In the instant case, the district court followed the teaching of *Hankish* and we find no abuse of discretion in its refusal to declare a mistrial or to conduct more extensive *voir dire*.

V

The ADL appeals the district court's denial of its motions for sanctions against LaRouche and his lawyers. This motion was founded upon Rule 11 Fed. R. Civ. P.; the inherent powers of the court, and 28 U.S.C. § 1927.

Attorneys fees may be awarded against a losing party who has "acted in bad faith, vexatiously, wantonly or for oppressive reason." *Alyeska Pipeline Service Company* v. *Wilderness Society*, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975). This bad faith exception may be applied to counsel as well as to litigants. *Roadway Express* v. *Piper*, 447 U.S. 752, 766, 100 S. Ct. 2455, 65 L.Ed.2d 488 (1980). Whether to impose such sanctions can best be decided by the district court, which has first hand knowledge of counsel's conduct in the course of the action. Deference is, therefore, accorded the judgment of the district court, and it will not be reversed but for abuse of discretion. *Nelson* v. *Piedmont Aviation*, 750 F.2d 1234 (4th Cir. 1984). On the basis of the record, we find no abuse of discretion in the district court's denial of this motion, and we affirm.

AFFIRMED.

United States Court of Appeals
For the Fourth Circuit

No. 84-2327

LYNDON H. LaROUCHE, JR.,
APPELLANT,

v.

NATIONAL BROADCASTING COMPANY, INC.; et al.,
APPELLEES.

ENTERED: FEBRUARY 24, 1986

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Phillips and Judge Ervin.

For the Court,
JOHN M. GREACEN, *Clerk*

In the United States District Court for the
Eastern District of Virginia
Alexandria Division

Civil Action No. 84-0136-A

LYNDON H. LAROUCHE, JR.,

PLAINTIFF,

v.

NATIONAL BROADCASTING COMPANY, *et al.*,

DEFENDANTS.

ORDER

Upon review of the pleadings and argument of counsel the Court, on August 10, 1984, ruled as follows:

1. The plaintiff's motion to extend the pre-trial discovery period is denied, however, the plaintiff is hereby authorized to take the deposition of Sy Pearlman for a period of up to two hours on a date agreeable to all counsel.

2. The Plaintiff's motion to compel defendants NBC, Nykanen, Lynch and Ross to reveal the identity of confidential sources that have been withheld under claim of privilege is denied.

3. The plaintiff's motion for summary judgment on the NBC counterclaim is denied without prejudice.

Entered this 7 day of (ILLEGIBLE), 1985.

(s) JAMES C. CACHERIS
JAMES C. CACHERIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 84-0136-A

LYNDON H. LAROUCHE, JR.,
PLAINTIFF,

v.

NATIONAL BROADCASTING COMPANY, et al.,
DEFENDANTS.

ORDER

This matter came on to be heard on the Plaintiff's Motion to Preclude Defendant From Relying on Information Obtained From Undisclosed Sources and after hearing and reviewing both oral and written argument of counsel on this Motion, it is

ORDERED that the Plaintiff's Motion to Preclude Defendant From Relying on Information From Undisclosed Sources be and hereby is denied.

ENTERED this 23rd day of October, 1984.

(s) JAMES C. CACHERIS
JAMES C. CACHERIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 84-0136-A

LYNDON H. LAROUCHE, JR.,
PLAINTIFF,

v.

NATIONAL BROADCASTING COMPANY, *et al.*,
DEFENDANTS.

ORDER

In accordance with the accompanying Memorandum Opinion, it is

ORDERED:

(1) that plaintiff and counterdefendant Lyndon H. LaRouche, Jr.'s Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial is DENIED;

(2) that plaintiff and counterdefendant Lyndon H. LaRouche, Jr.'s Motion for a Remittitur is GRANTED. Defendant and counterplaintiff National Broadcasting Company's judgment for $3,000,000 punitive damages is reduced to $200,000. National Broadcasting Company will have 21 days to accept the remittitur or a new trial shall be held on the issue of damages.

(3) that the Clerk shall forward certified copies of this Order and accompanying Memorandum Opinion to all counsel of record.

February 20th, 1985
Alexandria, Virginia

(s) JAMES C. CACHERIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 84-0136-A

LYNDON H. LAROUCHE, JR.,
PLAINTIFF

v.

NATIONAL BROADCASTING COMPANY, *et al.*,
DEFENDANTS.

MEMORANDUM OPINION

This matter is before the court on the plaintiff/counter-defendant Lydon H. LaRouche, Jr.'s ("LaRouche") Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.[1]

On November 1, 1984, a jury returned a verdict of $2,000 compensatory damages and $3,000,000 punitive damages in favor of defendant/counterplaintiff National Broadcasting Company, Inc. ("NBC") on its counterclaim for intentional interference with business relations. For reasons set forth below, LaRouche's Motion for Judgment Notwithstanding the Verdict is denied and LaRouche's Motion for a Remittitur is granted.

---

[1] The court gave LaRouche 10 days to file his Memorandum in support of his Motion. The Memorandum was due November 12, 1984, however, it was not filed until November 13, 1984. The court will consider the Motion on its merits notwithstanding its tardiness.

I

Background

LaRouche's Amended Complaint sought damages against NBC and others for libel, conspiracy to libel, and statutory conspiracy.[2]

The defendants filed answers denying plaintiff's allegations and NBC filed a counterclaim alleging four counts: Lanham Act violation, interference with business relations, prima facie tort, and Racketeer Influenced and Corrupt Organization Act ("RICO") violation. LaRouche denied NBC's allegations.

At the close of Plaintiff's evidence, this court dismissed LaRouche's allegations of conspiracy and statutory conspiracy on the grounds that there was no evidence to support these claims. At the close of NBC's evidence, this court also dismissed two of the causes of action in NBC's counterclaim: (1) the Lanham Act violation, and (2) prima facie tort. The court took under advisement LaRouche's Motions to Dismiss the Interference with Business Relations and the RICO count. On November 1, 1984, following eight days of trial and one day of deliberation, the jury rejected LaRouche's defamation claim. The jury also rejected NBC's RICO claim. The jury returned a verdict in favor of NBC on the counterclaim for interference with business relations in the amount of $2,000 compensatory damages and $3,000,000 punitive damages.

LaRouche argues that the evidence at the trial was unsufficient as a matter of law to sustain the verdict against him. Also, LaRouche alleges in the alternative that the amount of punitive damages awarded was excessive.

---

[2] Statutory conspiracy §§ 18.2-499 and 18.2-500, Va. Code (Repl. Vol. 1982).

II

A. Interference with Business Relations

The first inquiry is whether sufficient evidence was presented at trial to support the jury's verdict finding that LaRouche had interfered with NBC's business relations. Federal Rule of Civil Procedure 50(b) provides that a party who has moved for a directed verdict may move to have the verdict set aside and have judgment entered in accordance with his motion for a directed verdict. It is well settled that a court should not reverse a jury verdict unless there is a complete absence of probative facts to support the jury's conclusion. *See, e.g., Basham* v. *Pennsylvania Railroad Co.*, 372 U.S. 699, 700-701 (1963); *Sherril White Construction, Inc.* v. *South Carolina National Bank*, 713 F.2d 1047 (4th Cir. 1983).

The court gave the jury the following charge:

> "NBC further claims that Mr. LaRouche or his associates deliberately interfered with the relationship between NBC and its news sources, in order to injure NBC.
>
> "In order to return a verdict for NBC on this counterclaim, you must find by a preponderance of the evidence that
>
> "(1) Mr. LaRouche or his associates knew of the relationship that existed between NBC and its news sources, although not necessarily in detail;
>
> "(2) Mr. LaRouche or his associates did some act which interfered with that relationship;
>
> "(3) Mr. LaRouche or his associates intended their actions to interfere with NBC's relationship with its sources, and that he or they were not primarily motivated by some legitimate purpose of their own;
>
> "(4) NBC suffered harm because of Mr. LaRouche's or his associate's interference."

LaRouche objected to this charge only on the ground that it did not conform to the law of agency as he perceived it. In response, the court instructed the jury on agency. Mr. LaRouche has therefore waived any other objections he may have had to this charge. Fed. R. Civ. P. 51.

LaRouche's libel complaint related to two NBC broadcasts: a "Nightly News" broadcast on January 30, 1984, and a "First Camera" broadcast on March 4, 1984. NBC's counterclaim for intentional interference with business relations concerned an interference with an interview NBC had scheduled with Senator Daniel Patrick Moynihan ("Moynihan") for the broadcasts. The evidence presented at trial with regard to this claim is detailed below.

On January 30, 1984, co-defendant Pat Lynch ("Lynch"), producer of the First Camera broadcast, appeared at LaRouche's Leesburg, Virginia, residence with a camera crew for the purpose of filming LaRouche's environs. While there, one of LaRouche's security guards grabbed a clipboard from the front seat of one of the NBC vehicles. The clipboard indicated that at 5:15 p.m. an interview was scheduled between Lynch and Senator Moynihan at Moynihan's office. The security guard was seen speaking into the microphone on his headset.

Later that day, Lynch and her researcher, Kathi Paterno, were called by an individual identifying himself as an aid to Senator Moynihan. This individual stated that he was calling on behalf of Moynihan to cancel the interview. Similarly, Moynihan's office received a call from an imposter alleging to be an employee of NBC calling to cancel that afternoon's interview. Lynch became suspicious when a second phone call was received by NBC from a person alleging to be an aid of Moynihan. Lynch called Moynihan's office and learned that no one from Moynihan's office had placed the calls. The interview eventually was rescheduled at the original time. Portions of the interview were played on the First Camera broadcast. (Tr. 636-639).

LaRouche was aware that someone from his staff had a conversation with Kathi Paterno. He specifically testified that a member of his staff communicated with someone on Paterno's staff and found out that NBC was having a meeting later in the day with Senator Moynihan.

Furthermore, LaRouche's own deposition testimony, admitted into evidence without objection, proved that he interfered with NBC's business relationships. LaRouche stated that he "investigated" NBC. (NBC Trial Ex. 35, 5/24/84 at 148-49; 6/7/84 at 202). LaRouche testified that information extracted from Lynch by one of his followers was cross-checked (NBC Trial Ex. 35, 6/8/84 at 4-5), and LaRouche mentioned telephone calls to persons he claimed were Lynch's sources.

NBC also introduced a leaflet from "the LaRouche Campaign" that was slipped under the door of Moynihan's office on January 30, 1984, entitled " 'Fat' Lynch to Interview Moynihan Today." The first sentence of the leaflet stated: "According to today's NBC-TV log, Pat Lynch and her NBC-TV roving camera crew have an appointment to do a filming in the Senate offices of Senator Pat Moynihan at 5:15 p.m. this afternoon." (NBC Exhibit 7, 10/25/84). Also on January 30, 1984, NBC received a letter from one of LaRouche's attorneys, Odin P. Anderson. The letter mentioned that, "Ms. Pat Lynch and her associate Ms. Kathy Paterno disclosed in substantial detail to a caller numerous contacts and sources utilized by her in the conception and preparation of her intended story line for her upcoming First Camera segment on Mr. LaRouche." (NBC Exhibit 37, 10/25/84.)

In conclusion, this court upholds that there were sufficient facts to support the jury's verdict as to the first three elements of the tort of interference with business relations.

LaRouche also argues that the fourth element of the tort of interference with business relations is absent—the actual breach or termination of a business relationship. However, the law is not that a relationship must be breached or terminated, but

merely that it must be interfered with. For example, W. Prosser & W. Keeton, *Prosser & Keeton on the Law of Torts*, § 129, 5th Ed. (1984), in its discussion of the tort of interference with business relations, states:

> It is usually said that tort liability may be imposed upon a defendant who intentionally and improperly interferes with the plaintiff's right under contract with another person if the interference causes the plaintiff to lose the right under the contract or makes the contract rights more costly or less valuable.

American Sanitary Service, Inc. v. *Walker*, 276 Or. 289, __, 554 P.2d 1010, 1012-13 (1976), involved a dispute over garbage collection. The plaintiff held an exclusive franchise to collect garbage in a specified geographical area. The defendant moved plaintiff's garbage cans from their usual locations, picked up garbage in the area, and offered to provide garbage service at cheaper rates. Since the plaintiff had no contract with the individual customers, but only with the municipality, no claim could be made out for inducement of breach of contract. The Oregon Supreme Court upheld the cause of action because the defendant's actions made the plaintiff's relationships with individual customers more difficult. In *American Sanitary*, the court stated:

> The right to recover damages as a result of a defendant's intentional interference with plaintiff's business interest has been recognized in this jurisdiction when defendant's wrongful actions have rendered plaintiff's obligations more onerous or prevented plaintiff from realizing the full benefit of his contract with a third party. . . . 'Any act injuring or destroying persons or property which retards or makes more difficult or prevents performance or makes performance of less value to the promisee, may fall within the scope of the tort.' (Quoting Carpenter, *Interference with Contract Relations*, 41 Harv. L. Rev. 728, 762 (1928).

276 Or. 389, __, 554 P.2d 1010, 1012-13 (1976).

In *Martin Ice Cream Co.* v. *Chipwich, Inc.*, 554 F. Supp. 933, 945 (S.D. N.Y. 1983), the court held that the elements of the tort of interference with business relations are an "interference with business relations existing between the plaintiff and a third party, *either* with the sole purpose of harming the plaintiff *or* by means that are 'dishonest, unfair, or in any other way improper' " (emphasis in original) (quoting *Robbins* v. *Ogden Corp.*, 490 F. Supp. 801, 811 (S.D. N.Y. 1980)).

LaRouche argues that NBC has failed to show any actual damages and therefore NBC has failed to prove one of the elements of its claim. LaRouche relies on the case of *Morochnick* v. *Quigley*, 17 Mass. App. 1035, 461 N.E.2d 1220 (1984), *rev. denied*, 392 Mass. 1101 (1984). In *Morochnick*, the plaintiff's complaint alleged intentional interference with an advantageous business relationship. The defendant had telephoned plaintiff's supervisor on several occasions to complain about plaintiff's work habits in an effort to have the plaintiff fired. However, the plaintiff was not fired by his supervisor. The trial judge held that there was no actual damage, but awarded $3,000 as nominal damages. In reversing the judgment, the court found that, since no damages were shown, that plaintiff had failed to prove one of the elements of his claim. In the case at bar, NBC *has* proved actual damages. NBC suffered damages in the form of the time that Lynch and Paterno had to take from their busy schedules to straighten out the Moynihan matter. This time could have been devoted to their actual jobs. Instead, the time was wasted dealing with the disruptions created by LaRouche and his followers.

B. Punitive Damages

The next inquiry is whether this is a case justifying an award of punitive damages. In the present case, the jury awarded NBC $2,000 on their counterclaim, and $3,000,000 in punitive damages.

The jury found LaRouche guilty of interfering with NBC's attempt to gather information for their news program. This is a very serious charge. The right to receive ideas is crucial to the proper functioning of a democratic society. As the Supreme Court has stated, "The right of freedom of speech and press...embraces the right to distribute literature,...and necessarily protects the right to receive it." *Martin* v. *Struthers*, 318 U.S. 141, 143 (1943) (citation omitted). As Justice Brennan has stated in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980):

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government (citations omitted). Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

448 U.S. at 588-89 (BRENNAN, J., concurring in judgment).

These same policy considerations that justify preventing the Government from unreasonably restricting public access to information apply to the actions of a private individual such as LaRouche who attempts to impede and intimidate the press in gathering news. Investigative reporters, when gathering news, are constantly on the road and must make telephone calls from a variety of places. If informants are circumspect in relaying information to NBC because they fear it might be an inposter, this

could severely hamper NBC's newsgathering efforts. Also, people might not give NBC information at all, because they fear they will be harassed.

LaRouche argues that the jury considered hearsay or other improper evidence in coming to its conclusion on the counterclaim. Although many of the video tapes admitted into evidence were hearsay and a limiting instruction was given, co-defendants Lynch, Mark Nykanen, and Brian Ross testified as to what they knew of LaRouche's behavior and LaRouche did not object. Thus, this testimony was admitted with no limiting instructions and LaRouche has waived any hearsay objection. Fed. R. Evid. 103(a)(1).

One of the purposes of punitive damages is to prevent similar actions upon the part of the responsible party and others in the future. *See, e.g., Stevens* v. *Abbott, Proctor & Paine,* 288 F.Supp. 836 (E.D. Va. 1968). The jurors heard many examples of similar harassing tactics employed against reporters who were attempting to do stories about LaRouche. Co-defendant Brian Ross, who narrated the "Nightly News" story on LaRouche, received a threatening phone call on his answering machine. Followers of LaRouche picketed against Pat Lynch in front of NBC's New York office. A reporter from the *Manchester Guardian* was threatened when he was doing a story on LaRouche. On another occasion, a young reporter in the Chicago area was subjected to harassment following an attempt to speak with some of the LaRouche candidates for the school board. Followers of LaRouche placed flyers containing derogatory remarks about the reporter on the windshields of cars in her neighborhood. (*See* NBC Exhibit 31, 10/26/84.) This evidence shows that the interference with the Moynihan interview was not an isolated occurrence and that a punishment was warranted in the case at bar to deter such actions by LaRouche and his followers in the future. Thus, this court holds that this is a proper case in which to award punitive damages.

C. Amount of Punitive Damages

LaRouche also argues that the punitive damages verdict was excessive, and that it was the result of passion and prejudice or other improper influence.

In a diversity case, the propriety and amount of an award of punitive damages is governed by the law of the state in which the federal court sits. *Taylor* v. *Sandoval*, 442 F.Supp. 491, 495 (D. Colo. 1977); IA Moore's Federal Practice ¶0.310 at 3403 (2d ed. 1977). The general rule is that there is no fixed standard for the measure of exemplary or punitive damages and the amount of the award is largely a matter within the discretion of the jury. *Worrie* v. *Boze*, 198 Va. 533,____, 95 S.E.2d 192, 201 (1957); 25 C.J.S., Damages, § 126, p. 737. In assessing the propriety of an award of punitive damages, this court must also bear in mind that punitive damages have a two-fold purpose: (1) to indemnify the plaintiff for the loss sustained, and (2) to prevent similar actions upon the part of the responsible party and others in the future. *Stevens* v. *Abbott, Proctor & Paine*, 288 F.Supp. 836 (E.D. Va. 1968); *Sperry Rand Corp.* v. *Electronic Concepts, Inc.*, 325 F.Supp. 1209 (E.D. Va. 1970).

LaRouche's argument that the jury was tainted and acted out of passion and prejudice is without merit. This court excused one juror who had fear for her safety. The court carefully *voir dired* the other members of the jury and concluded that the trial should continue. As the court indicated on the record, the court carefully observed the jury. They did not indicate any fear in undertaking their task. The jury was also unusually attentive and intelligent. For example, after requesting a second viewing of the Sara Fritz and Senator Moynihan interviews, the jury sent a note asking the court if the videotapes were hearsay. The jury spent twelve hours deliberating the case. Furthermore, the jury's rejection of NBC's RICO counterclaim indicates that the jury was not swayed by passion and prejudice.

However, this court is troubled by the size of the punitive damages in light of the compensatory damages awarded. This court has conducted an exhaustive search of the decisions on the relationship between punitive and compensatory damages in United States courts. Some courts hold that a punitive damage award need not bear any reasonable relationship to the compensatory damages, while other courts hold that the punitive damage award must be reasonably proportionate to the actual damage sustained. *See generally* 22 Am.Jur.2d, Damages § 265 (1965). However, this court has not found a decision in any jurisdiction which sustained a ratio of punitive damages to compensatory damages as high as the ratio in this case—1500 to 1. This court believes that this is an excessive ratio and that some adjustment must be made.

Although the amount of the award is largely a matter within the discretion of the jury, if the trial court concludes that a verdict is excessive, it has the authority under Virginia Code § 8.01-383.1 (Repl. Vol. 1984) to require the plaintiff to remit a portion of the award or submit to a new trial. *See Sampson* v. *Sampson*, 221 Va. 896, ____, 275 S.E.2d 597, 601 (1981); *Edmiston* v. *Kupsenel*, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964). In awarding a new trial, it is within the trial judge's discretion to decide whether a new trial should be on all issues or solely on the issue of damages. *Sampson* v. *Sampson*, 221 Va. at____, 275 S.E.2d at 601; *Rutherford* v. *Zearfoss*, 221 Va. 685, 689-90, 272 S.E.2d 225, 228 (1980).

This court feels that it has a duty to keep a verdict for punitive damages within reasonable bounds considering the purpose to be achieved as well as the agregious conduct of LaRouche and his followers. In observance of such duty, this court concludes that the award of punitive damages in this case was excessive. However, for reasons already stated, this court feels that this is a special case which justifies an unusually

high award. This court concludes that the maximum sum for punitive damages that the law would accept in this trial is $200,000.[3]

This result is consistent with the ruling of the federal district judge in *Butts* v. *Curtis Publishing Company*, 225 F.Supp. 916 (N.D. Ga. 1964). In *Butts*, the jury awarded $3 million dollars to a university athletic director as punitive damages for a libelous magazine article charging that he had fixed a football game. The trial judge found that the award was excessive as a matter of law and required a remittitur of $2.6 million. On appeal, the Fifth Circuit held that the trial judge's requiring of a remittitur as to excessive punitive damages was not an abuse of discretion. *Curtis Publishing Company* v. *Butts*, 351 F.2d 702, 718-719 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).

LaRouche also urges this court to consider his testimony that he has no income and virtually no assets of his own in determining the proper amount of damages in this case. This court finds LaRouche's testimony with regard to his assets to be completely lacking in credibility. LaRouche testified that he has not filed an Income Tax Return for the past decade, that he does not know who pays for his food, his rent for his Leesburg mansion, his clothes, his vast security forces, or his airplane transportation. He stated that he believes that his "friends" provide these amenities.[4] Contrary to his testimony,

---

[3] Such a result also brings the ratio of punitive damages to compensatory damages in line with decisions from other jurisdictions. For example, in *Aspinwall* v. *Gowens*, ____ Ala. ____, 405 So.2d 134 (1981), the jury awarded $1 million to the insured party against the insurer following its failure to pay a claim of slightly over $2,000 under a major medical policy. The Alabama Supreme Court ordered a remittitur of $750,000. *See also Wetherbee* v. *United Insurance Co.*, 18 Cal.App.3d 266, 95 Cal.Rptr. 678 (1971) ($200,000 punitive damages against insurer for failure to pay benefits held to be not excessive, although actual damages were only $1,050).

[4] LaRouche also testified that his Presidential campaign was spending a great deal of money on television advertisements, paying as much as $250,000 for a single program.

LaRouche's lavish lifestyle discussed at trial shows that he lives like a millionaire.[5]

In conclusion, this court will grant a remittitur of $2.8 million on the punitive damages award. Thus, NBC is entitled to $2,000 compensatory damages and $200,000 punitive damages. NBC will have 21 days from the date of this opinion to accept the remittitur or a new trial shall be held on the issue of damages.

An appropriate order shall issue.

Dated: February 20th, 1984 s/ JAMES C. CACHERIS
Alexandria, Virginia *United States District Judge*

---

[5] Indeed, the $3 million punitive damage award originally assessed by the jury against LaRouche indicates that the jurors rejected LaRouche's testimony that he was a man of extremely limited means.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION No. 84-0136-A

LYNDON H. LAROUCHE, JR.,
PLAINTIFF,

v.

NATIONAL BROADCASTING COMPANY, ET AL.,
DEFENDANTS.

ORDER

An Acceptance of Remittitur having been filed by the defendant/counterplaintiff National Broadcasting Company (NBC) in accordance with this court's Order dated February 20, 1985, it is accordingly

ORDERED:

(1) that Judgment be, and it hereby is, ENTERED in favor of the defendant/counterplaintiff National Broadcasting Company (NBC) and against the plaintiff/counterdefendant Lyndon H. LaRouche, Jr. in the amount of $200,000 punitive damages, and $2,000 compensatory damages, plus costs and interest on National Broadcasting Company's counterclaim;

(2) that plaintiff/counterdefendant Lyndon H. LaRouche, Jr.'s Motion for a New Trial is DENIED;

(3) that the Clerk shall forward certified copies of this Order to all counsel of record.

March 15, 1985
Alexandria, Virginia

s/ JAMES C. CACHERIS
United States District Judge

No. 85-1914

Supreme Court, U.S.
FILED
JUN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LYNDON H. LAROUCHE, JR.,

Petitioner,

—v.—

NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., LYNCH, NYKANEN, AND ROSS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Respondents National Broadcasting Company, Inc., Lynch, Nykanen and Ross

Of Counsel:

THOMAS J. KAVALER
DEVEREUX CHATILLON
JOAN T. INFARINATO
CAHILL GORDON & REINDEL
(a partnership including professional corporations)

PETER K. STACKHOUSE
TOLBERT, SMITH, FITZGERALD & STACKHOUSE
2300 Ninth Street, South
Arlington, Virginia 22204
(703) 521-5252

June 21, 1986

QUESTIONS PRESENTED

1. Whether this Court should review discovery rulings of the United States District Court for the Eastern District of Virginia rooted in plaintiff's demonstrated failure to exhaust alternative sources of information and plaintiff's proven pattern of harassment, which were affirmed by the United States Court of Appeals for the Fourth Circuit, and which had no impact on the result of the action?

2. Whether this Court should review an interpretation of Virginia law by the District Court, which was affirmed by the Court of Appeals?

3. Whether this Court should review the District Court's refusal to declare a mistrial, which was affirmed by the Court of Appeals?

PARTIES BELOW

The parties to the proceedings below were Lyndon H. LaRouche, Jr., plaintiff and counterclaim defendant, and National Broadcasting Company, Inc., Pat Lynch, Mark Nykanen, Brian Ross, Anti-Defamation League of B'nai B'rith, and Irwin Suall.[1]

---

1 National Broadcasting Company, Inc., which was the sole counterclaim plaintiff, advises the Court pursuant to Supreme Court Rule 28.1 that while, prior to June 9, 1986, it was a wholly owned subsidiary of RCA Corporation, both RCA Corporation and National Broadcasting Company, Inc. are now wholly owned by General Electric Company.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties Below ii

Table of Authorities iv

Statement of the Case 1

Statement of Facts 2

Summary of Argument 9

ARGUMENT 9

I. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S FACT-SPECIFIC DISCOVERY AND EVIDENTIARY RULINGS WAS CORRECT AND PRESENTS NO NOVEL OR IMPORTANT QUESTIONS WARRANTING THIS COURT'S REVIEW 9

II. THIS COURT SHOULD NOT REVIEW THE DISTRICT COURT'S INTERPRETATION OF VIRGINIA LAW, WHICH WAS AFFIRMED BY THE FOURTH CIRCUIT 16

III. ON THE FACTS OF THIS CASE THE DISTRICT COURT'S REFUSAL TO DECLARE A MISTRIAL, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS WELL WITHIN ITS DISCRETION AND IS NOT AN ISSUE SUITABLE FOR CERTIORARI 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases PAGE

Apicella v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975) 13n

Baker v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972) *cert. denied*, 411 U.S. 966 (1973) 13n

Beach v. *Shanley*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984) 14

Bernhardt v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956) 16

Brown v. *Reardon*, 770 F.2d 896 (10th Cir. 1985) 10n

Bruno & Stillman, Inc. v. *Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) 12n-13n

Buckley v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) 10n

Bursey v. *United States*, 466 F.2d 1059 (9th Cir. 1972).. 13n

Cervantes v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 13n

Continental Cablevision, Inc. v. *Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D. Mo. 1984) 13n

Democratic National Committee v. *McCord*, 356 F. Supp. 1394 (D.D.C. 1973) 13n

DeRoburt v. *Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981) 15n

Dowd v. *Calabrese*, 577 F. Supp. 238 (D.D.C. 1983) ... 15n

Downing v. *Monitor Publishing Co.*, 120 N.H. 383, 415 A.2d 683 (1980) 15n

Ewers' Administrator v. *National Improvement Co.*, 63 F. 562 (C.C.W.D. Va. 1894) 17n

PAGE

Falwell v. *Penthouse International, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981) 10n

Goins v. *McKeen*, 605 F.2d 947 (6th Cir. 1979) 17, 17n

Greenberg v. *CBS Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (2d Dep't 1979) 15n

Harden v. *Adams*, 760 F.2d 1158 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985) 10n

Krause v. *Rhodes*, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978) 17n

Laborers' International Union v. *United States Department of Justice*, 772 F.2d 919 (D.C. Cir. 1984) 10n

Margoles v. *United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969) 17

Marshall v. *United States*, 360 U.S. 310 (1959) (*per curiam*) 17

McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984) 10n

Miller v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) 13n

Mize v. *McGraw-Hill, Inc.*, 82 F.R.D. 475 (S.D. Tex. 1979) 13n

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 14

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964).. 9

Oak Beach Inn Corp. v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 464 N.E.2d 967, 476 N.Y.S.2d 269 (1984), *cert. denied*, 105 S. Ct. 907 (1985).....14, 15n

Palmer v. *Hoffman*, 318 U.S. 109 (1943)..... 10n

PAGE

Paramount Film Distributing Corp. v. *Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955) 16n

Philadelphia Newspapers, Inc. v. *Hepps*, 106 S. Ct. 1558 (1986) 9n-10n

Porter v. *Eckert*, 465 F.2d 1307 (5th Cir. 1972) 8n

Riley v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979) ... 13n

Roviaro v. *United States*, 353 U.S. 53 (1957) 15n

Sellers v. *Time, Inc.*, 299 F. Supp. 582 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3d Cir.), *cert. denied*, 400 U.S. 830 (1970) 10n

Sharon v. *Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) 10n

Silkwood v. *Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) 13n

Texas & New Orleans Railroad Co., v. *Underhill*, 234 F.2d 620 (5th Cir. 1956) 16n

United States v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983) 12n

United States v. *Hankish*, 502 F.2d 71 (4th Cir. 1974) ..17, 18

United States v. *Herring*, 568 F.2d 1099 (5th Cir. 1978). 17n

United States v. *Hubbard*, 493 F. Supp. 202 (D.D.C. 1979) 13n

United States v. *Jackson*, 649 F.2d 967 (3d Cir.), *cert. denied*, 454 U.S. 1034 (1981) 17

United States v. *Jones*, 542 F.2d 186 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976) 18

United States v. *Lord*, 565 F.2d 831 (2d Cir. 1977) 17

United States v. *Mountain State Fabricating Co.*, 282 F.2d 263 (4th Cir. 1960) 8n

PAGE

United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 906 (1985) 17n

United States v. *Pretzinger*, 542 F.2d 517 (9th Cir. 1976) 13n

United States v. *Watchmaker*, 761 F.2d 1459 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986) 18

U.S. News & World Report, Inc. v. *Campaigner Publications, Inc.*, 222 U.S.P.Q. 123 (D.D.C. 1982) 14n

Vance v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (*per curiam*) 16

Warner v. *Kewanee Machinery & Conveyor Co.*, 411 F.2d 1060 (6th Cir. 1969), *cert. denied*, 398 U.S. 906 (1970) 8n

Wehling v. *Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979) 15n

Zerilli v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981) 12n, 13n

Constitutional Provision

U.S. Const. amend. I 12, 15

Rules

U.S. Sup. Ct. R. 17.1 16

Fed. R. Evid. 103 ..... 6n

Statute

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* (1982 & Supp. II 1984) 2, 8

Treaties

5A J. Moore, *Moore's Federal Practice* (2d ed. 1986) .. 8n

1 J. Weinstein & M. Berger, *Weinstein's Evidence* (1985) 6n

8 C. Wright & A. Miller, *Federal Practice and Procedure* (1970) 15n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1914

LYNDON H. LAROUCHE, JR.,

Petitioner,

—v.—

NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., LYNCH, NYKANEN, AND ROSS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On January 30, 1984, and on March 4, 1984 National Broadcasting Company, Inc. ("NBC") broadcast two news stories about Mr. LaRouche, one on Nightly News and one on a program called First Camera. Mr. LaRouche sued for libel. On April 3, 1984, in its answer NBC asserted a counterclaim against LaRouche based on an attempted cancellation of an interview with United States Senator Daniel Patrick Moynihan by an impostor claiming to be from NBC and a similar telephone call to NBC from an impostor claiming to be an aide to Senator Moynihan. After a nine-day trial, the jury concluded that LaRouche had failed to demonstrate that the NBC broadcasts were false. The jury rejected NBC's claim under the

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* (1982 & Supp. II 1984), as amended, but ruled in NBC's favor on its claim of interference with advantageous business relationships under the common law of Virginia. An award of $202,000 to NBC, after remittitur, was entered by the Court.

LaRouche moved for judgment *n.o.v.* on NBC's counterclaim against him, which was denied. He then appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals unanimously rejected LaRouche's claims of error in the District Court's discovery rulings, evidentiary rulings, interpretation of Virginia state law and refusal to declare a mistrial. A petition for *en banc* consideration was denied.

STATEMENT OF FACTS

The Broadcasts

In the two broadcasts about LaRouche, NBC reported his view that the Queen of England is a dope dealer (JA 62); his assertion that he was targeted for assassination along with President Reagan and Pope John Paul II (JA 62); his continuing efforts to intimidate reporters (JA 57, 62, 64); his violation of rules of the Federal Election Commission (JA 65); and his belief that NBC works with the "drug lobby" and is supported by the KGB. (JA 68) The second NBC broadcast also included statements of non-NBC employees that LaRouche believes Jews are responsible for all evils in the world (JA 65), that any serious investigation of LaRouche by the Internal Revenue Service would lead to criminal indictment and the closing down of his organization (JA 65), and that he at one time proposed the assassination of President Jimmy Carter, Zbigniew Brzezinski, Joseph Lund, Paul Warnecke, and David Rockefeller.[2] (JA 66)

---

2 The following abbreviations will be used in this brief: "Pet'n" for citation to the Petition for a Writ of Certiorari, "Pet'n App." for

Pre-Trial Proceedings

Brian Ross, an NBC correspondent, and Ira Silverman, an NBC producer, prepared the January 30, 1984 Nightly News broadcast complained about. (Ross Tr., V, 858, 863-64) Because LaRouche now complains about issues that are relevant only to the later First Camera broadcast, no further discussion of the Nightly News broadcast is included here.

On February 10, 1984, LaRouche filed his first complaint in this action. (JA 2) In addition to NBC and Mr. Ross, the complaint named Pat Lynch as a defendant, even though Ms. Lynch was the producer of First Camera, a program that was not to be broadcast until March 4, 1984. (JA 21, 29) On February 16, 1984, LaRouche served and filed 80 requests for admission, 17 interrogatories, and 36 document requests, directed primarily to the as yet unaired First Camera broadcast. (JA 2; *see* JA 215-318)

On March 21, LaRouche filed an amended complaint (JA 2, 38), adding as a defendant Mark Nykanen, an NBC correspondent who appeared on the March 4 First Camera broadcast, and including a cause of action for defamation based on the First Camera broadcast, as well as a cause of action for conspiracy. After moving for and obtaining a protective order from the District Court, NBC made available almost 650 documents and 170 videotapes to LaRouche for inspection and copying. (JA 363) NBC withheld under a claim of privilege

---

citation to the Appendix to the Petition, "JA ____" for citation to the joint appendix below, "LaRouche Tr., III, 1252" for citation to testimony at trial not included in the Joint Appendix by the name of the witness, the trial transcript volume, and page number, and "NBC Trial Ex. 114" for citation to trial exhibits not included in the Joint Appendix.

While the references above are to the two transcripts of the broadcasts that were attached to the Amended Complaint, these transcripts were never admitted into evidence. Videotapes of the actual broadcasts have been lodged with the Court of Appeals for the Fourth Circuit. (LaRouche Trial Ex. 2; NBC Trial Ex. 114)

only two documents and four videotapes in their entirety and one page of notes. (JA 319-27)

On July 16, 1984, LaRouche filed a motion seeking to compel disclosure of confidential sources. (JA 7, 214) At the time the motion was filed, LaRouche had taken only the deposition of Brian Ross; he had not taken depositions of anyone associated with the First Camera broadcast. (JA 364) Despite the Local Rule of the Eastern District of Virginia allowing five non-party depositions, LaRouche had taken no non-party depositions. (*Id.*) Magistrate Sewell denied LaRouche's motion,[3] stating that:

> "I consider specifically the matter of exhaustion of other sources, the specificity of the need without first performing other discovery in the case. And I also consider the type and nature of the controversy based upon the history of the case, the actions of the various parties in connection with discovery thus far in the case, the depositions taken, and the various other matters which relate to the nature and type of the case that we have.
>
> "For those reasons I'm going to deny the motion to compel further production at this time without prejudice to the plaintiff to renew the motion at some later time." (JA 396-97)

LaRouche renewed his motion to compel disclosure before he had taken the deposition of Pat Lynch. (JA 408; *see* JA 410) At this time, LaRouche had taken only four non-party depositions (JA 409-10, 422-24); he had not even taken the fifth deposition allowed him during the discovery period. LaRouche had noticed the deposition of four non-NBC em-

---

3 On the same day Magistrate Sewell also denied LaRouche's motion to extend the five non-party deposition limit set by the Local Rules. The Magistrate gave LaRouche two options: interviewing witnesses first and, if necessary, noticing a *de bene esse* deposition prior to trial; if, after taking five depositions, another specific deposition were needed, LaRouche could ask for it. (JA 392-94)

ployees, but made no effort to take those depositions. (JA 423-24) LaRouche never even noticed the deposition of Larry Cooper, the on-the-record source of the statements in the broadcast about the discussion by LaRouche of the proposed assassination of President Carter and others. (JA 423) The District Court denied LaRouche's motion. (JA 429)

On the day the trial began, October 22, 1984, LaRouche filed his third motion, seeking to preclude the NBC defendants from relying on confidential sources at trial. (JA 684) After argument, that motion, too, was denied. (JA 693, 727-30) Balancing the interests of LaRouche as a litigant against the interests of both NBC and the public in protecting the confidentiality of the sources, the District Court relied upon the fact, *inter alia*, that "I have no evidence before me that the plaintiff has tried to comply with [the requirement of] exhaustion." (JA 728)

The Trial

LaRouche called eight witnesses to prove that the broadcasts were false. The first two witnesses, on cross-examination, testified that they agreed with LaRouche that NBC, *The New York Times*, *The Washington Post*, Walter Mondale and Henry Kissinger were part of the "drug lobby." (Grauerholz Tr., I, 192-95; Mirak Tr., I, 240, 246, 256)

The next three witnesses, all flown in from Germany, testified that they never heard LaRouche threaten to assassinate members of the Carter Administration. (Rumpf Tr., II, 333-52; Friesecke Tr., II P.M., 21-29; Hellenbroich Tr., II P.M., 42-45) The credibility of each was put at issue on cross-examination. (*E.g.*, Rumpf Tr., II, 361-63; JA 740-47; Hellenbroich Tr., II P.M., 47) Other witnesses testified that the statements in the NBC broadcasts that LaRouche is anti-Semitic were untrue (Weber Tr., VI A.M., 958-59) and the statements that LaRouche is anti-black were untrue. (Innis, Tr. II A.M., 307-09)

The final witness on falsity was LaRouche himself. LaRouche personally testified that virtually everything reported

in the two broadcasts was false. (*E.g.*, LaRouche Tr., VI, 1010, 1020-30, 1035-37, 1067-91) He specifically denied that he had ever expressed a desire to assassinate Jimmy Carter or any member of Carter's administration. (JA 1118) Mr. LaRouche also testified that the only public figure in the United States in more danger of assassination than LaRouche is President Reagan (JA 1161), that the Bush, Kennedy, and Carter campaigns all were involved in setting him up for assassination in the 1980 presidential campaign (JA 1164, 1166, 1168), that Governor Averill Harriman, Secretary of State John Foster Dulles, Secretary of State Henry Kissinger and Secretary of State Alexander Haig were all Nazis (JA 1174-77), and that KGB officials dictated to presidential candidate Walter Mondale the foreign policy program he adopted. (JA 1200-02)

LaRouche also called Pat Lynch, the producer of the First Camera program, to testify. Ms. Lynch testified that she had begun working on the March 4, 1984 program in early December of 1983 (Lynch Tr., II P.M., 72), that she had interviewed more than 108 people on the record for the LaRouche broadcast (Lynch Tr., II P.M., 143, 158) and that she repeatedly had sought to interview LaRouche, but had been rebuffed. (*E.g.*, Lynch Tr., II P.M., 153, 155) Ms. Lynch testified for four days on how she assembled the First Camera broadcast and on what it was based. (*E.g.*, JA 865-89) Ms. Lynch was questioned extensively by LaRouche's counsel as to what she had been told by Larry Cooper, an on-the-record source for the assassination story.[4]

During Ms. Lynch's testimony, at LaRouche's request, the District Court asked the jurors whether they had read an article in *The Washington Post* that morning. (The article reported on death threats made against Ms. Lynch.) (JA 750-68) When two

---

4 As LaRouche's counsel either solicited this testimony or did not object to its admission, it came in for truth and was not subject to a limiting instruction on the grounds of hearsay. *E.g.*, Fed. R. Evid. 103; 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103(02) (1985). No such instruction was, in any event, even sought.

jurors responded, the court asked them to come to the bench. One juror had seen only the headline and a second had seen only a reference to the article. Both testified that they could be fair jurors in the case. (JA 769) In denying LaRouche's motion to strike the two jurors, the court said:

> "I find the jurors I think are very candid, very forthright and indicated that they have an open mind. I think they both looked me right in the eye and told me they could decide this case on the basis of what they hear here and are not influenced by it." (JA 772)

The court then instructed the jury, as it had at the start of the trial, that they should decide the case on the basis of what they heard in the courtroom and to disregard any reports in the newspapers. (JA 773-76)

The next morning, after a sketch artist for *New Solidarity*, a LaRouche publication, appeared in the courtroom (JA 901), the jury sent the District Court a note asking whether the artist was for the plaintiff. (JA 899) At LaRouche's counsel's request, the court sent a note asking why the jury was concerned. (JA 903-04) When the jury's response included a crossed out portion that indicated that some members expressed concern for their personal safety (JA 907), the court conducted an individual *voir dire* of each juror. (JA 908-13) As a result of that *voir dire* the court excused Juror Kelly who expressed fear for her personal safety, even though she said that her fear was based solely on the testimony of the day before. (JA 909-10)[5] After the court decided to excuse Juror Kelly, he said:

> "I don't find anything on my questioning of all of the jurors that show that any others have any fear because I asked them a very direct question, no preliminaries, they just said no. I don't think there was any hesitation on the part of any of the jurors. . . . I don't find anything in

---

5 Juror Fewel, an alternate who was excused before the jury began its deliberations (Tr., IX, 1825-26), said that she just did not like the idea of the artist sitting and looking at the jury and drawing. (JA 908-09)

> the record as to my view of these jurors to show anything that they have in any way been poisoned. This has been a very, very attentive jury to what is going on. It's been a very fine jury." (JA 920)

At the end of the day, when the judge denied a request that further inquiry be made of the jury to determine to what extent the subject was discussed, he noted that he had carefully observed the jury during the day and saw no evidence of fear. (JA 1038-39; see also JA 1388; JA 1585-87)

The jury returned a verdict for the defendants on LaRouche's defamation claim, concluding that the broadcasts were true. (JA 1447) The jury awarded NBC both actual ($2,000) and punitive ($3,000,000) damages on its counterclaim against LaRouche for interference with advantageous business relationships. (JA 1452) It returned a verdict for LaRouche on NBC's alternate counterclaim based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et. seq.* (1982 & Supp. II 1984), as amended ("RICO"). (JA 1452)

Post-Trial Proceedings

LaRouche made a motion for judgment *n.o.v.* or in the alternative for a new trial on NBC's counterclaims. (JA 1469) He did not move either for a directed verdict or for judgment *n.o.v.* on his defamation claim against the NBC defendants.[6] The District Court denied LaRouche's motion for judgment *n.o.v.* on the counterclaims, but on remittitur reduced the punitive damages awarded against LaRouche to $200,000, which NBC accepted. (JA 1589, 1605)

---

6 As a result, LaRouche is precluded from arguing that the evidence was insufficient to support the jury's verdict on the defamation claim. *See, e.g., Porter* v. *Eckert*, 465 F.2d 1307, 1309 (5th Cir. 1972); *Warner* v. *Kewanee Machinery & Conveyor Co.*, 411 F.2d 1060, 1063 (6th Cir. 1969), *cert. denied*, 398 U.S. 906 (1970); *United States* v. *Mountain State Fabricating Co.*, 282 F.2d 263, 265 (4th Cir. 1960); 5A J. Moore, *Moore's Federal Practice* ¶ 50.12, at 50-90 (2d ed. 1986).

SUMMARY OF ARGUMENT

In his petition for certiorari Mr. LaRouche seeks review of a number of fact-specific rulings that the District Court made well within the bounds of its discretion and that were affirmed by the Court of Appeals for the Fourth Circuit. These rulings, on motions, *inter alia*, to compel discovery and to declare a mistrial for juror exposure to publicity during a libel trial, provide no novel questions of law that merit this Court's review. Additionally, LaRouche's request that this Court review the District Court's interpretation of Virginia law, which was affirmed by the Court of Appeals, is not a proper subject for certiorari.

The decisions of the District Court and the Fourth Circuit are consistent with well-established law and present no occasion for review by this Court.

ARGUMENT

I.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S FACT-SPECIFIC DISCOVERY AND EVIDENTIARY RULINGS WAS CORRECT AND PRESENTS NO NOVEL OR IMPORTANT QUESTIONS WARRANTING THIS COURT'S REVIEW

LaRouche cannot seriously claim that the District Court's confidential source rulings interfered with his ability to meet his burden of proof on the issue of actual malice as that term has been defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. The jury's verdict was based solely upon LaRouche's failure to prove that the broadcasts were false.[7] Thus, LaRouche's repeated arguments that the rulings

---

7 LaRouche did not object to the charge of the court as to his burden to prove that the broadcasts about him were false. *See, e.g., Phila-*

of both courts below interfered with his ability to prove constitutional malice is a *non sequitur.* Only if both the District Court and Court of Appeals interfered with LaRouche's ability to demonstrate falsity (as they did not) and were in error (as they were not) could any claim of reversible error be entertained by this Court.[8]

LaRouche focuses on two statements made in the First Camera broadcast to illustrate the "impediment" that he suffered as a result of these rulings. The first is the statement, attributed to Larry Cooper in the broadcast, that LaRouche at one time had plotted the assassination of members of the Carter Administration. LaRouche complains that his inability to cross examine Ms. Lynch about an additional, off-the-record source for this story somehow impaired his right to a fair trial. (Pet'n at 9-10) Yet LaRouche does not explain how knowledge of a confidential secondary source could have enabled him to contradict Ms. Lynch's reliance on the disclosed primary source, Mr. Cooper. LaRouche's position is made even more untenable by his failure to depose Mr. Cooper during discovery. (JA 423) Finally, LaRouche presented four

---

delphia Newspapers, Inc. v. *Hepps*, 106 S. Ct. 1558 (1986); *Buckley* v. *Littell*, 539 F.2d 882, 889-90 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Falwell* v. *Penthouse International, Ltd.*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582, 584 n.2 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3d Cir.), *cert. denied*, 400 U.S. 830 (1970); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 558 (S.D.N.Y. 1984). LaRouche admitted that he is a public figure. (LaR. Br. at 29)

8 The standard of review of a decision on a motion to compel discovery is limited to whether the District Court abused its discretion. *See, e.g., Laborers' International Union* v. *United States Department of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984); *Brown* v. *Reardon*, 770 F.2d 896, 907-08 (10th Cir. 1985); *Harden* v. *Adams*, 760 F.2d 1158, 1167 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985). To merit reversal of an evidentiary ruling by any appellate court, LaRouche must demonstrate not only error, but also prejudice. *See, e.g., McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984); *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943). This he cannot do.

witnesses to the jury, all of whom swore that this statement was false.[9] The jury simply did not believe him or his witnesses.

LaRouche also focuses on a second aspect of the First Camera broadcast: the statement by one observer that "[a]ny serious investigation by the Internal Revenue Service would lead to criminal indictments and the closing down of the LaRouche organization." (JA 65) (Pet'n at 9-10) LaRouche claims that the identity of NBC's confidential sources was crucial to his ability to prove falsity as to this statement as well. Yet, LaRouche put on no witnesses from his organizations with knowledge of their financial dealings to testify as to the supposed falsity of NBC's statement. The jury, however, heard LaRouche's own testimony on the subject. After testifying that "the statement is totally false in the form in which it was broadcast" and that "anyone who would believe that or say that is crazy, is a lunatic, is a mental case" (JA 1185), LaRouche testified as follows:

> "Q. Did you file a tax return this year?
> "A. No, I did not.
>
> "Q. What about last year?
> "A. No, Mr. Kavaler.
>
> "Q. What about the year before?
> "A. No, Mr. Kavaler.
>
> "Q. Have you filed a tax return anytime in the last ten years, Mr. LaRouche?
> "A. No, Mr. Kavaler.
>
> "Q. Who paid for the suit you're wearing, Mr. LaRouche?
> "A. I don't know, Mr. Kavaler.

---

9 Three of the witnesses testified that one of them was present when Cooper was with LaRouche and that they heard no discussion similar to that reported to Lynch by Cooper. (*E.g.*, Rumpf Tr., II, 351-52, Friesecke Tr., II P.M. 29; Hellenbroich Tr., II P.M., 45) LaRouche himself explicitly denied the truth of this part of the First Camera story. (JA 1118)

"Q. You just found it in your closet, did you?

"A. No, it was a gift by persons associated with me some years ago.

"Q. Are the other suits in your closet ones that you went out to a store and bought?

"A. I have on no occasion gone out to a store and bought an article of more than a haircut, a $5 price, in the past ten years.

"Q. Do you know who pays for all those suits in your closet?

"A. I do not, Mr. Kavaler. I do not know in detail. I have some general idea that they are gifts from people associated with me or others.

"Q. I see. Who pays for your food, Mr. LaRouche?

"A. The same, Mr. Kavaler." (JA 1185-86)

LaRouche testified he does not know who pays for his large rented house in Leesburg, Virginia (shown on videotape to the jury) (JA 1187-89) or for his first class or chartered plane fares. (JA 1191-93) LaRouche did not pay for the lawyers representing him in this personal defamation suit. (JA 1193-94) In denying LaRouche's motion for judgment *n.o.v.*, the District Court found LaRouche's testimony "that he has no income and virtually no assets of his own" to be "completely lacking in credibility," and noted that the jury's punitive damage award indicated that the jurors similarly had rejected LaRouche's testimony. (JA 1603) Given such a record, there is simply no basis for concluding that the lack of identification of NBC's sources was prejudicial to LaRouche's case.

Moreover, the rulings of the courts below were correct. Every federal court of appeals that has considered the question has recognized some First Amendment protection for sources to whom a promise of confidentiality has been made.[10] At a

---

10 *See, e.g., United States* v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Zerilli* v. *Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583

minimum, the courts have required that a party seeking disclosure of such confidential information pursue reasonable alternative sources for the information, especially in civil cases in which no Sixth Amendment rights are at stake, before using compulsory process to compel a journalist to break a promise of confidentiality.[11] LaRouche did not even begin to try to obtain this information elsewhere.[12] In fact, he concededly already possessed it. As the Court of Appeals succinctly summarized:

> "In denying LaRouche's motions, the district court grounded its decision on the fact that LaRouche had not exhausted reasonable alternative means of obtaining this same information. LaRouche did not depose Larry Cooper, the public source of the Carter assassination story. He did not exhaust all his non-party depositions before making the motion, and he failed to demonstrate to the court unsuccessful, independent attempts to gain the requested information. In fact, *New Solidarity*, a LaRouche publication, claimed that LaRouche already knew the names of all of NBC's principal sources well

---

(1st Cir. 1980); *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified*, 628 F.2d 932 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 1041 (1981); *Riley* v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 436-38 (10th Cir. 1977); *United States* v. *Pretzinger*, 542 F.2d 517 (9th Cir. 1976) (*per curiam*); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Continental Cablevision, Inc.* v. *Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D. Mo. 1984); *United States* v. *Hubbard*, 493 F. Supp. 202 (D.D.C. 1979).

11 *See, e.g., Zerilli* v. *Smith*, *supra*, 656 F.2d at 714-15; *Baker* v. *F&F Investment*, *supra*, 470 F.2d at 783-84; *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394, 1397-98 (D.D.C. 1973); *Mize* v. *McGraw-Hill, Inc.*, 82 F.R.D. 475, 477 (S.D. Tex. 1979); *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 83, 85 (E.D.N.Y. 1975).

12 In this case, LaRouche demanded the identity of confidential sources for the First Camera broadcast *before* that broadcast had been aired or even edited. (JA 2; *see* JA 215-318)

before the two reports were broadcast." (Pet'n App. at A-8 to A-9)

In its rulings the District Court also considered the strong public policy embodied in the New York shield law[13] (JA 1436-37), *Beach* v. *Shanley*, 62 N.Y.2d 241, 255-56, 465 N.E.2d 304, 312, 476 N.Y.S.2d 765, 773 (1984) (Wachtler, J., concurring); *see Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 168, 464 N.E.2d 967, 972, 476 N.Y.S.2d 269, 274 (1984), *cert. denied*, 105 S. Ct. 907 (1985), as well as a final factor that is *sui generis* to this case—LaRouche's history of harassing reporters and their sources. This factor was an appropriate one for consideration and amply supported by the record. *See NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

When NBC produced hundreds of documents and video tapes upon LaRouche's request (JA 363), NBC first sought a protective order that limited dissemination of material designated confidential—material that contained unbroadcast information from and the identities of NBC's on-the-record sources—to LaRouche himself and his counsel. (*See* JA 3-4, 215-318; Motion of NBC for Protective Order, Dkt No. 42.) That motion, based on LaRouche's and his organizations' prior history of harassing reporters and their sources, was granted. (JA 4)[14]

---

13 Ms. Lynch and Mr. Ross are based in New York out of NBC's national headquarters and are New York residents who worked on broadcasts that originated in New York.

14 The motion cited, *inter alia*, an occasion when LaRouche followers used the name of a *U.S. News & World Report* reporter to conduct interviews. This action was enjoined by the United States District Court for the District of Columbia. *U.S. News & World Report, Inc.* v. *Campaigner Publications, Inc.*, 222 U.S.P.Q. 123 (D.D.C. 1982). *See* Affidavit of Peter K. Stackhouse filed May 2, 1984, Dkt. No. 42; *see also* JA 85-86.) The motion also was based upon published reports that LaRouche campaign workers impersonated reporters and upon a LaRouche campaign teletype that documented a nationwide campaign of harassment of the Anti-Defamation League and all who report the ADL's comments on LaRouche. (Affidavit of Peter K. Stackhouse filed May 2, 1984, Dkt. No. 42)

The District Court correctly held that LaRouche had not overcome the NBC defendants' qualified First Amendment privilege. Once a court has determined that the identity of a reporter's confidential source is protected, the privilege does not become divested at trial. There is simply no legal basis for penalizing a party who *properly* asserts a privilege not to disclose confidential communications.[15]

The ruling of the District Court and its affirmance by the Court of Appeals are both well grounded in the record and legally correct. They do not provide a basis for review by this Court.

---

15 *See, e.g., Wehling* v. *Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979) ("we find no provision in the federal discovery rules which authorizes a court to impose sanctions on a party who resists discovery by asserting a valid claim of privilege"); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018, at 147 (1970) ("Rule 37 contains elaborate sanctions if a deponent fails to answer a question after being directed to do so by the court. . . . But if there is a valid claim of privilege, the court cannot order that the question be answered and that discovery be permitted") (footnote omitted).

The cases cited by LaRouche in support of his claim of prejudice differ markedly on their facts from this one. In *DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981) and *Downing* v. *Monitor Publishing Co.*, 120 N.H. 383, 415 A.2d 683 (1980) (Pet'n at 13) the courts imposed a presumption that no sources existed as *punishment* for failure to obey the courts' orders to disclose sources. The District Court in this case, however, declined to enter any such order requiring disclosure. In *Dowd* v. *Calabrese*, 577 F. Supp. 238, 243-44 (D.D.C. 1983) (Pet'n at 13, 15), the court imposed sanctions based on, *inter alia*, the record's indication of a strong likelihood that the sources did not in fact exist. While *Roviaro* v. *United States*, 353 U.S. 53 (1957) (Pet'n at 13), may support the proposition that in a criminal case the government cannot assert a privilege that would impede a defendant's constitutional right to confront witnesses, it is LaRouche who is the plaintiff in this civil case. Finally, *Greenberg* v. *CBS Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (2d Dep't 1979), an early case construing the New York Shield Law, effectively has been overruled by the New York Court of Appeals in *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 464 N.E.2d 967, 476 N.Y.S.2d 269 (1984), *cert. denied*, 105 S. Ct. 907 (1985).

II.

THIS COURT SHOULD NOT REVIEW THE DISTRICT COURT'S INTERPRETATION OF VIRGINIA LAW, WHICH WAS AFFIRMED BY THE FOURTH CIRCUIT

LaRouche seeks to have this Court issue a writ of certiorari to review the interpretation of Virginia law by the District Court, which was affirmed by the Court of Appeals. (Pet'n at 22-24) This attempt must fail for two reasons. First, the interpretation of state law by federal courts sitting in diversity is not a proper subject for certiorari. *See* Supreme Court Rule 17.1(a) & (c). Second, this Court traditionally gives great weight to determinations of local law by the lower federal courts more familiar with that law.[16] *See Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (*per curiam*); *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204-05 (1956).

III.

ON THE FACTS OF THIS CASE THE DISTRICT COURT'S REFUSAL TO DECLARE A MISTRIAL, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS WELL WITHIN ITS DISCRETION AND IS NOT AN ISSUE SUITABLE FOR CERTIORARI

LaRouche claims that the District Court's failure to declare a mistrial or engage in further questioning of the jurors who were exposed to publicity during the trial amounted to prejudicial error requiring reversal. (Pet'n at 29)[17] The District Court,

---

16 Here, Judge Cacheris, who presided at the District Court, previously had served as a state court judge in Virginia.

17 The question of prejudicial publicity generally arises in criminal cases where a defendant's life or liberty are at stake. The civil cases cited by petitioner in support of his argument involved not publicity but extensive private communications with or threats to jurors by third parties. *See Texas & New Orleans Railroad Co.* v. *Underhill*, 234 F.2d 620 (5th Cir. 1956); *Paramount Film Distributing Corp.* v. *Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955);

however, followed the proper procedure to the letter in its handling of the *Washington Post* article that LaRouche claims prejudiced the jury.[18]

First, in his initial instructions to the jurors, the District Court judge admonished them against reading any articles or listening to any broadcasts concerning Mr. LaRouche or the trial. (Tr., I, 51) *See e.g., United States* v. *Jackson*, 649 F.2d 967 (3d Cir.), *cert. denied*, 454 U.S. 1034 (1981); *Goins* v. *McKeen*, 605 F.2d 947, 954 (6th Cir. 1979).

Second, when an article was published in the *Washington Post*, the District Court conducted a *voir dire* of the jurors to determine whether any jurors had seen the article. When two jurors indicated they had, he questioned them individually, outside the hearing of the other jurors. *See, e.g., United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974); *United States* v. *Jackson*, 649 F.2d 967, 975-76 (3d Cir.), *cert. denied*, 454 U.S. 1034 (1981); *United States* v. *Lord*, 565 F.2d 831, 838-39 (2d Cir. 1977); *Margoles* v. *United States*, 407 F.2d 727, 735 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969); *see also Marshall* v. *United States*, 360 U.S. 310, 312 (1959) (*per curiam*) ("The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . [E]ach case must turn on its special facts.").

Ewers' Administrator v. *National Improvement Co.*, 63 F. 562 (C.C.W.D. Va. 1894) and *Krause* v. *Rhodes*, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978), which effectively was overruled by *United States* v. *Pennell*, 737 F.2d 521, 532 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 906 (1985).

18 In the two criminal cases Mr. LaRouche relies on, the trial judge did not follow the well-established procedure that the District Court did here. *Goins* v. *McKeen*, 605 F.2d 947, 954 (6th Cir. 1979) (failure to instruct jury in advance not to read publicity about trial); *United States* v. *Herring*, 568 F.2d 1099, 1102 (5th Cir. 1978) (failure to question jury to determine extent of exposure to newspaper article or headline).

The judge also conducted a *voir dire* when the jury expressed concern over the presence of a sketch artist (from a LaRouche publication) in the courtroom. (JA 899) When one juror expressed fear that arose not from published news accounts, but solely from the testimony (JA 909-10), the judge excused her. He denied the appellant's motion for a mistrial because he found on the basis of his *voir dire*, that the jury was "very fine" and had not been "poisoned" by any external publicity. (JA 920)[19]

A mistrial is hardly automatic where there has been publicity; the decision to continue the trial rests "in the sound discretion of the district judge, and he should exhaust other possibilities before aborting a trial." *United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974). *See United States* v. *Jones*, 542 F.2d 186, 197 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976) (no error in refusal to declare a mistrial when juror who expressed fear due to a headline was excused); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986) ("Discussions among the jurors as to their fear of the defendants are not inappropriate, so long as such discussions do not lead them to form an opinion of the defendants' guilt or innocence of the offenses charged.")

The District Court's decision to continue the trial despite LaRouche's two motions for a mistrial is consistent with all these rulings. The judge's careful questioning, coupled with his dismissal of one juror, demonstrate that he acted in an excess of caution in assuring the impartiality of the jury. The District Court did not abuse its discretion by denying LaRouche's motions for a mistrial and therefore there is no reason for this Court to exercise its supervisory power.

---

19 LaRouche contends that another member of the jury—Juror Fewel—also expressed fear, but was not excused on that basis. Juror Fewel, however, merely testified that she "didn't like the idea of [the artist] being able to draw, you know, sitting and looking right at us." (JA 908-09) Juror Fewel was an alternate juror who ultimately did not participate in the jury's deliberations. (Tr., IX, 1825-26)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FLOYD ABRAMS
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

THOMAS J. KAVALER
DEVEREUX CHATILLON
JOAN T. INFARINATO
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

PETER K. STACKHOUSE
TOLBERT, SMITH, FITZGERALD
& STACKHOUSE
2300 Ninth Street, South
Arlington, Virginia 22204
(703) 521-5252

Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1914

In the Supreme Court of the United States

OCTOBER TERM, 1986

LYNDON H. LAROUCHE, JR.,
PETITIONER,

v.

NATIONAL BROADCASTING COMPANY, INC., ET AL.,
RESPONDENTS.

SUPPLEMENTAL BRIEF OF PETITIONER

ODIN P. ANDERSON*
ROBERT L. ROSSI
ANDERSON & ASSOCIATES, P.C.
One Longfellow Place, Suite 216
Boston, MA 02114
(617) 742-8200
Attorneys for Petitioner

* Attorney of Record

6 pp

In the
Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1914

LYNDON H. LaROUCHE, JR.,
PETITIONER,

v.

NATIONAL BROADCASTING COMPANY, INC., ET AL.,
RESPONDENTS.

SUPPLEMENTAL BRIEF OF PETITIONER

The petitioner, Lyndon H. LaRouche, Jr., having previously filed a petition for writ of certiorari with this Court, submits the instant supplemental brief to call the court's attention to a new matter in connection with the counterclaim judgment which is the subject of the third question presented.

Additional Reason For Granting The Writ:

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL ON THE COUNTERCLAIM JUDGMENT IS IN CONFLICT WITH A RECENT DECISION OF THE FIFTH CIRCUIT.

The jury in the trial of this action returned a verdict in favor of respondent NBC on its counterclaim for interference with business relations in the amount of $2,000 in actual damages and $3,000,000 in punitive damages. (Appendix A-21). In connection with his post-trial motion j.n.o.v. or for a new trial, petitioner contended, *inter alia*, that the jury verdict resulted from passion and prejudice and therefore could not stand. The district court rejected the argument that the jury acted out of passion and prejudice, but found that the punitive damage award was excessive. The court therefore ordered a remittitur reducing the punitive damages from $3,000,000 to $200,000. (A-25, 26).

Petitioner argued in his brief to the Court of Appeals for the Fourth Circuit that the excessive amount of the punitive damage award indicated that the jury had acted out of passion and prejudice, and therefore a new trial, not a remittitur, should have been granted. The court's affirmance of the judgment is an implicit rejection of that argument, and is in direct conflict with a recent decision of the Fifth Circuit.

In *Wells v. Dallas Independent School District*, 793 F.2d 679 (5th Cir. 1986), the court was faced with a $1.9 million jury damage award which was reduced to $250,000 on remittitur by the district court. The court noted that while damage awards which are merely excessive are candidates for remittitur, where a verdict results from passion or prejudice, a new trial, not a remittitur, is the proper remedy. *Id.* at 683. The court went on to state that

> at some point on the scale an excessive award becomes so large that it can no longer be considered merely excessive. At that point, when an award is 'so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive,' . . . remittitur is inadequate and the only proper remedy is a new trial.

Id. at 684 (citation omitted). The court then concluded that, in view of the fact that the district court felt compelled to reduce the award by more than an order of seven, the jury award was so large that it reflected passion or prejudice; it found that it was

> difficult to regard the quarter-million dollar remnant of a virtual two-million verdict as in any significant sense a product of the jury. It was the judge's verdict; a new trial is called for.

Id. at 684.

In the present case, the district court felt that the punitive damage award was excessive, and felt compelled to reduce the award by a factor of fifteen. This is more than twice the figure which the court in *Wells* considered to reflect the existence of passion and prejudice. Thus, the decision of the court of appeals in the instant case is in conflict with the Fifth Circuit's decision in *Wells*, and should be reviewed by this Court.

Respectfully submitted,

ODIN P. ANDERSON*
ROBERT L. ROSSI
ANDERSON & ASSOCIATES, P.C.
One Longfellow Place, Suite 216
Boston, MA 02114
Tel: (617) 742-8200
Attorneys for Petitioner

---

* Attorney of Record